Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1997

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HARRY L. HUNT

*Petitioner,*

v.

TRUST ADMINISTRATIVE COMMITTEE OF THE EASTERN AIR LINES VARIABLE BENEFIT RETIREMENT PLAN FOR PILOTS. *et al.*

*Respondents.*

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Eastern Air Lines Variable Retirement Plan for Pilots was structured with Eastern Air Lines (the employer) designated as the "Plan's Administrator", and a Trust Administrative Committee as the "Plan's Fiduciary", whose responsibilities were defined in a Plan Document that is part of the "Pilot Working Agreement/Contract", negotiated periodically between the Eastern Air Lines and the Airline Pilots Association, Inc. (ALPA). Changes to the Contract were subject to pilot ratification, and modifications to the "Plan" required approval by the U.S. Department of Labor, and the Internal Revenue Service.

In the reversal of the District Court's decision by the Eleventh Circuit panel, the questions presented are:

1. Whether ERISA permits suits against benefit plans as entities.

2. Whether the Court of Appeals properly reversed an ERISA plan participant's vested, confirmed, and available benefit, contrary to one of the principal purposes enunciated by the Supreme Court in Central States et al. V. Central Transport, Inc., et al., 472 U.S. 559, 105 S.Ct. 2853 (1985)

3. Whether the reversal of the District Court's decision by the Eleventh Circuit panel sets a precedent that provides "ERISA" retirement plan fiduciaries an unrestricted cloak of protection under the "common law of trust", especially in cases where responsibilities are specifically defined and subject to contractual working agreement provisions negotiated between the employer and plan participants.

## LIST OF PARTIES

As the Petitioner *pro se*, I certify to the best of my knowledge that in addition to myself, the following is a complete list of the trial judge(s), appeal judges, attorneys, persons, firms, partnerships, and/or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to any party named.

1. Berman, Richard E. - counsel for Defendants/Appellants

2. Boyd, W. Todd - counsel for Defendants/Appellants

3. Clark, Thomas A. - United States Senior Circuit Court Judge

4. Cox, Emmett R. - United States Circuit Court Judge

5. Davis, Mary Ellen - counsel for Plaintiff/Appellee

6. Eastern Air Lines Variable Benefit Retirement Plan for Pilots - Defendant/Appellant

7. Fabiano, John G. - counsel for Hawthorne Associates, Inc.

8. Hale and Dorr - counsel for Hawthorne Associates, Inc.

9. Hawthorne Associates, Inc. - Defendant

10. Paine, William H. - counsel for Hawthorne Associates, Inc.

11. Pelzer, John H. - counsel for Apellants

12. Penson, Albert C. - counsel for Plaintiff/Appellee

13. Penson &Padgett - counsel for Plaintiff/Appellee

14. Ronkin, Shari J. - counsel for Appellants

15. Ruden, Barnett, McClosky, Smith, Schuster & Russell, P.A. - counsel for Defendants/Appellants

16. Satterfield, Bonnie S. - counsel for Defendants/ Appellants

17. Stafford, William - United States District Court Judge

18. Tjoflat, Gerald B. - United States Circuit Court Judge

19. Trust Administrative Committee of the Eastern Air Lines Variable Benefit Retirement Plan for Pilots - Defendant/Appellant

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is not reported at this time but is set forth in the Appendix to the Petition ("Pet. App.") at 1a. The opinion of the United States District Court is not reported but set forth at Pet. App. at 65a.

## JURISDICTION

The opinion of the court of appeals was issued on August 5, 1997. A timely suggestion for rehearing *en banc* was filed with the Eleventh Circuit Court of Appeals, but was denied on November 18, 1997. On February 19, 1998, Justice Kennedy granted the petitioner's timely application for an extension of time to file a petition for writ of certiorari to and including March 17, 1998 (Pet. App. E, pp. 82a-83a, *infra*). This Court has jurisdiction under U. S. C. 1254(1).

## STATEMENT OF THE ISSUES ASSERTED TO MERIT THE PETITION

I. This case is appropriate for issuing a writ of certiorari to insure uniformity of prior decisions of the United States Supreme Court in compliance with the Employment Retirement Income Security Act of 1974 ("ERISA"), and with other decisions of the Eleventh Circuit of the United States Court of Appeals.

A. The apparent de novo standard of review applied by the panel in this case exceeds the scope of such review established in this and in other circuits. See, McDonald v. Hillsborough County School Board, 821 F.2d 1563 (11th Cir. 1987).

B. The decision in this matter prohibits an ERISA claim against the benefit plan as an entity, thereby creating a conflict with specific provisions of ERISA and with previous actions of Eleventh Circuit Court in permitting an ERISA claim against the benefit plan as an entity. Hunt v. Hawthorne Associates, Eastern Airlines Variable Benefit Retirement Plan for Pilots, No. 95-2078, (11th Cir. Aug. 5, 1997) (COX, Circuit Judge, concurring in part and dissenting in part), See, Springer v. Wal-Mart Associates Group Health

Plan, 908 F.2d 897 (11th Cir. 1990); Guy v. Southeastern Iron Workers' Welfare Fund, 877 F.2d 37 (11th Cir. 1989).

The decision is of great importance due to the magnitude of a wholesale prohibition of claims against ERISA benefit plans as entities, and the fact that the decision of the majority panel is considered by Judge Cox, and by some circuits, to be contrary to the language and intent of ERISA. See, Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1324 (9th Cir. 1985), and Lee v. Burkhart, 991 F.2d 1004, 1009 (2d Cir. 1993). Additional conflicts arise from the panel's dismissal of Count IV of Hunt's Amended Complaint.

C. The panel's decision regarding the burden of proof conflicts with other decisions of this circuit. See Fine v. Semet, 699 F.2d 1091 (11th Cir. 1983).

D. The resulting decision, reversing the award of an ERISA plan participant's vested, confirmed and available benefits, is contrary to one of the principal purposes of ERISA, enunciated by the Supreme Court in several cases, e.g. Central States et. al v. Central Transport, Inc., et al. 472 U.S. 559, 569; 105 S.Ct. 2833, 2840 (1985), reh den 473 U.S. 926, 106 S.Ct. 17 (1985) that a worker who has fulfilled the necessary conditions, will actually receive the benefits that he was promised.

II. The following decision(s) by the Supreme Court of the United States and/or precedents of the Eleventh Circuit Court of Appeals that contradict the Eleventh Circuit panel's ruling in this case are:

A. Central States et al. V. Central Transport, Inc. et al., 472 U.S. 559, 105 S.Ct. 2853 (1985).

B. Boggs v. Boggs, 117 S.Ct. 1754, ___ U.S. ___ (1977).

C. Nachman Corporation v. Pension Benefit Guaranty Corporation, 466 U.S. 359, 100 S.Ct. 1723 (1980).

D. Springer v. Wal-Mart Associates Group Health Plan, 908 F.2d 897 (11th Cir. 1990).

E. Guy v. Southeastern Iron Workers Welfare Fund, 877 F.2d 37 (11th Cir. 1989).

F. Fine v. Semet, 699 F.2d 1091 (11th Cir. 1983).

G. McDonald v. Hillsborough County School Board, 821 F.2d 1563 (11th Cir. 1987).

## STATEMENT OF THE PROCEEDINGS AND DISPOSITION OF THE CASE

On February 20, 1992, Capt. Hunt, a retired Eastern Air Lines Pilot, brought an action in the United States District Court, Northern District of Florida, for recovery of retirement benefits and other relief available under the Employee Retirement Income Security Act ("ERISA") of 1974. On December 3, 1992, Capt. Hunt served an Amended Complaint alleging the following pertinent counts:

Count I - Failure to provide information pursuant to 29 U.S.C. § 1132(c)(1)(B).

Count II - Action to enforce rights under B-Plan pursuant to 29 U.S.C. § 1132.

Count III - Breach of fiduciary duty pursuant to 29 U.S.C. § 1104.

Count IV - Recovery of benefits pursuant to 29 U.S.C. § 1132.

Count V - Estoppel.

Count VI - Declaratory judgment.

Count VII - Injunctive Relief

On December 17, 1993, Counts V and VI of Plaintiff's Complaint were dismissed as to the TAC and the B-Plan. Capt. Hunt settled with Hawthorne before trial, leaving the TAC and the B-Plan as the only Defendants appearing at trial.

Judgment was entered in favor or Capt. Hunt against Hawthorne, pursuant to a settlement agreement with respect to Count I. Capt. Hunt's claim for relief against TAC in Count I was denied. Counts V and VI were dismissed. Judgment was entered in favor of the TAC and the B-Plan on Count III. Judgement was entered in favor of Capt. Hunt in the amount of $352,748.74 plus costs to be paid from the B-Plan Fund on Counts II and IV. The TAC and the B-Plan appealed judgment on Counts II and IV. Capt. Hunt cross-appealed judgment on Count I.

The United States Court of Appeals entered an order reversing the District Court's award of benefits to Hunt and affirming the District Court's denial of statutory penalty, on August 5, 1997.

## STATEMENT OF FACTS NECESSARY TO THE ARGUMENT OF THE ISSUES

### I. FACTS RELATIVE TO THIS CASE

1. Hunt's application for retirement benefits was approved by Eastern on April 22, 1991.

2. But for the moratorium imposed by the TAC, Hunt would have been paid.

3. A TAC-appointed trustee would make the appropriate distribution to the pilot.

4. The TAC and the Plan had the funds to pay Hunt's claims.

5. The evidence provided by the TAC to the District Court to support the moratorium was "without detail or supporting documentation," the numbers and figures were either incomplete or not adequately explained," and the TAC "relied too much on conjecture, supposition and imagination, and too little on concrete facts and analysis."

6. The District Court could not make any factual findings on how many pilots actually could, would, or did apply for lump sum benefits during the period of the moratorium, based on the information before the District Court. Also, the District Court was not provided with the number of pilots who were qualified for retirement under the terms of the contractual agreement in effect on and after January 18, 1991, prior to the implementation of Document 91C on June 30, 1992.

7. Hunt was entitled to receive a lump sum retirement benefit of $352,748.74, as confirmed by the Plan's actuary under the terms of the B-Plan in effect on March 1, 1991, which was Hunt's effective retirement date.

8. The B-Plan provided the TAC no express authority to impose the moratorium.

9. Document 91C to the plan was effective June 30, 1992.

10. The temporary moratorium imposed by the TAC was terminated by implementation of Document 91C to the Plan.

## II. FACTS RELATIVE TO THE PLAN

1. At no time was the "Plan" or the "Plan's assets" subject to bankruptcy proceedings; only Eastern Air Lines, Inc., the "Plan" administrator, was subject to the bankruptcy proceedings. On January 18, 1991, the "Plan" was fully funded by Eastern Air Lines.

2. The financial status of the "Plan's assets" as of January 18, 1991, was due to the TAC's failure, as fiduciary, to insure that the Fund Manager restrict investments in illiquid assets, such as real estate, to conform with the "prudent man" investment guidelines followed by knowledgeable investment firms in investing retirement fund portfolios.

3. The plan participant's eligibility to receive benefits from the "Plan" was based solely on age and/or years of service to qualify for retirement, except for persons reaching the mandatory retirement age of 60 years. Date of filing for benefits was not a consideration for receiving benefits from the "Plan".

4. Date of filing for receiving benefits from the "Plan" prior to the mandatory retirement age could be initiated or withdrawn "at will" by a participant after meeting the age and/or years of service criteria. This option was available to any qualified participant until reaching the mandatory retirement age of 60 years.

5. The accrued benefits due an eligible retiree was based on contributions paid on behalf of the participants by the employer, Eastern Air Lines. The contributions were

computed monthly and paid into the "Plan's assets" for the participants based on contractual rates of pay for the type of equipment flown by him/her and on the participant's years of service.

6. After the January 18, 1991 moratorium was declared by the TAC, other qualified or eligible participants, similar to Capt. Hunt, were paid lump-sum benefits from the "Plan's assets", in addition to the hundreds of annuitant retirees who continued to receive periodic payments from the same assets.

7. According to the contractual terms of the of the working agreement in effect through April 22, 1991, the time Capt. Hunt was cleared for retirement benefits by Eastern Air Lines, only the two following options for benefit payments were available to the vested, eligible plan participants; (1) a lump-sum distribution, or (2) a periodic annuity. Both options were to be paid from the "Plan's assets".

## REASONS, ARGUMENTS AND AUTHORITIES FOR GRANTING THE PETITION

### I. THE PETITION FOR WRIT IS JUSTIFIED TO ENSURE UNIFORMITY OF DECISIONS.

#### A. THE DE NOVO STANDARD OF REVIEW WAS IMPROPERLY APPLIED TO THE FACTUAL FINDINGS OF THE DISTRICT COURT.

The De Novo standard of review by the Eleventh Circuit Court of Appeals is limited to the conclusions of law drawn by the District Court. See, McDonald v. Hillsborough County School Board, 821 F.2d 1563 (11th Cir. 1987). Factual findings of the District Court must not be overturned

without a demonstration of clear error. Rule 52(a) Fed. R. Civ. P. Mixed questions of law and fact such as those presented by this ERISA claim require De Novo review of the legal conclusions but this application is a "clearly erroneous" standard to the underlying factual findings. Reich v. Lancaster, 55 F.3d 1034 (C.A. Tex.) 1995.

It is not the province of the Appellate Court to give different weight to the evidence. Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S.Ct. 2182, (1982). The Court of Appeals may not reverse the factual findings of the District Court if the evidence is plausible in light of the record viewed in its entirety. Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 573-574, 105 S.Ct. 1504 (1985). Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. Id., citing United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949) and Inwood Laboratories, Inc.

The Court of Appeals in this review, impermissibly reversed or overlooked factual findings of the District Court, substituted its own factual findings for that of the court, supplied factual findings not supported by the record, and raised issues not presented by the parties.

The Eleventh Circuit panel in its review, overlooked the factual finding of the District Court that "Hunt's application for retirement benefits was approved by Eastern on April 22, 1991." The pre-trial stipulation of the parties states that "but for the moratorium imposed by TAC, Hunt would have been paid."

The panel states the facts of the case "support our reading" that Eastern, not the TAC, has the authority to order payment. The factual finding of the District Court, as stipulated by the parties, that "but for the temporary moratorium unilaterally imposed by TAC . . . Hunt would have received his benefit" . . . must not be effectively reversed by the panel, without an express statement that the finding was clearly erroneous. Rule 52(a)Fed. R. Civ. P.

The Eleventh Circuit panel made a factual determination that Eastern, not TAC, ultimately authorized (or denied) distribution of the benefit to the retiree, upon his application. However, the District Court found that "a TAC appointed trustee . . . would make the appropriate distribution to the pilot." The panel effectively reversed this factual finding of the District Court without a determination that the District Court's finding was clearly erroneous. Rule 52(a) Fed. R. Civ. P.

The Eleventh Circuit panel made a determination that "the facts presented at trial bare out that the TAC acted reasonably in imposing the moratorium", (and thus reasonably in denying Hunt's application for lump sum benefits.) This determination gives more weight to the evidence than the District Court, which found that the TAC had the funds to pay Hunt's claims. Additionally, the District Court found that the facts presented by the TAC to support the moratorium were "without detail or supporting documentation," that the "numbers and figures were either incomplete or not adequately explained," and that the TAC "relied too much on conjecture, supposition and imagination, and too little on concrete facts and analysis."

The District Court could not make any factual findings on how many pilots actually could, would, or did apply for lump sum benefits during the period of the moratorium, based on the information before the District Court. In contrast, and without stating that the District Court's factual findings were clearly erroneous, the Eleventh Circuit panel determined that 2500 pilots were "effectively retired" with the shutdown of Eastern's flight operations on January 18, 1991. The panel then assumed either that hundreds or that all of these persons were eligible for retirement, and could apply for payment of lump-sum benefits. The Eleventh Circuit panel, through its extended de novo review, improperly equated the "termination of the pilots" with the "eligibility requirements for retirement",

ignoring the extensive requirements for eligibility in the Plan documents. The District Court could not support this finding based on the record, and the Eleventh Circuit panel effectively reversed the District Court's factual finding by supplying these facts on appeal, and then relying upon them to support its conclusion that the TAC acted reasonably.

In the Eleventh Circuit panel's review, beyond the standards set forth above, the panel created legal and factual issues where none existed. The panel created an issue as to whether or not TAC had the authority or ability to pay Hunt and whether or not Eastern should have been dismissed. This issue was not raised by the TAC or any other party without declaring any finding of Judge Stafford at the District Court level to be clearly erroneous.

In creating this issue, the Eleventh Circuit panel delves into the underlying Plan documents. The underlying Plan documents did not contemplate Eastern's termination of business, nor did the panel consider the findings of the Judge Stafford at the District Court.

Upon Eastern's termination of business on January 18, 1991, TAC effectively took over payment of benefits by imposing the moratorium. Its authority was not ratified until June 25, 1991 by Document 91B, referred to by the Eleventh Circuit panel, which authorized the TAC to make loans to Plan participants and to administer periodic lump-sum payments, and subsequently by Document 91C adopted in November 1992 and retroactive to June 30, 1992, all of which were addressed by Judge Stafford at the District Court.

As Judge Stafford at the District Court found in the Order Directing Entry of Judgment, the parties agreed that:

> ...Hunt's application for benefits was approved by Eastern on April 22, 1991;...that but for the temporary moratorium unilaterally imposed by the TAC on or about January 18, 1991, Hunt

> would have received a lump sum retirement benefit of $352,748.74;...that Hunt was entitled to such an amount under the terms of the B-Plan in effect on March 1, 1991, Hunt's effective retirement date;...that the B-Plan provided the TAC no express authority to impose the moratorium.

The District Court found that a TAC-appointed Trustee would make distribution to the pilot. The TAC never argued on appeal that Eastern was an indisposable party, just as it never argued that it did not have the authority to direct payment from the Plan.

The Eleventh Circuit panel failed to demonstrate that these findings by the District Court's were clearly erroneous. Accordingly, at all material times, the TAC controlled the distribution of funds to Hunt, and is the proper party to whom the District Court directed its order to pay Hunt. Directing that the monies be paid from the B-Plan Fund was proper because the B-Plan Fund held the monies, and as demonstrated below, is a proper party.

## B. THE PLAN AS A PROPER PARTY

The Eleventh Circuit panel found, without reciting any authority, "[N]or can the Plan as an entity provide any relief; the Plan alone is simply a written instrument executed by Eastern and ALPA."

The portion of Judge Cox's dissenting opinion regarding the ability of a party to recover benefits under ERISA in an action maintained solely against an ERISA plan as an entity demonstrates the conflict within the Eleventh Circuit, and presents an issue of great importance, as described in the opening paragraphs of this petition for writ.

> ERISA states in pertinent part that "An employee benefit plan may sue or be sued under this subchapter as an entity"...Any money judgment under this subchapter against an employee benefit plan shall be enforceable against the plan as an entity ...29 U.S.C.§ 1132(d)(1),(2) (Emphasis supplied).

The language of the statute is clear. The plan is an entity which can be sued for any money judgment.

The decision of the panel that the plan cannot be sued as an entity is contrary to the statute and cripples the enforcement provision of ERISA. The plan as an entity is a source for "**any** money judgement **under this subchapter**," contrary to the decision of the Eleventh Circuit panel. Id.

As cited by Judge Cox, he stated that this circuit has permitted actions asserting claims for ERISA benefits to proceed solely again ERISA plans. Springer v. Wal-Mart Associates' Group Health Plan, 908 F.2d 897 (11th Cir. 1990); Guy v. Southeastern Iron Workers' Welfare Fund, 877 F.2d 37 (11th Cir. 1989). The Eleventh Circuit panel's ruling in the instant case creates a conflict with these decisions and the decisions of other court's allowing such action. Gelardi v. Pertez Computer Corp., 761 F.2d 1323, 1324 (9th Cir. 1985) and Lee v. Burkhart, 991 F.2d 1004, 1009 (2d Cir. 1993).

The panel's decision fails to effectively distinguish the Legislature's clear and unambiguous language in ERISA, 29 U.S.C. § 1132(d)(1) permitting an employee benefit plan to "sue or be sued...as an entity." Although the Eleventh Circuit panel apparently directs its ruling as to Hunt's request for injunctive relief, it appears to be applied as a bar to Hunt receiving his monies from the Plan under Counts II and IV.

As found by Judge Stafford in the District Court, and not disputed by the parties at trial, Hunt was entitled to a

lump sum benefit of $352,748.74, an amount approved by Eastern, uncontested by the TAC, but never received because of the TAC's moratorium. It is also undisputed that the Plan held the monies and that there were sufficient funds from which to pay Hunt's claims. These findings were not found to be clearly erroneous. The Plan, as the entity holding the funds, and as a party not objecting to its role as a part on appeal, is a proper party against whom the District Court's order properly directed payment of Hunt's monies.

Additionally, although not subject to any issue raised on appeal, and without applying a clearly erroneous standard, the Eleventh Circuit panel unilaterally dismissed Count IV of Hunt's complaint, finding that the claim in Count IV was for a "money judgment." To do so, the Eleventh Circuit panel entered into a lengthy discussion regarding "legal" versus "equitable" relief, concluding that Count IV sought legal relief not authorized by ERISA.

The Eleventh Circuit panel concluded that Count II sought equitable relief because Hunt sought "an order requiring the Defendants to pay Hunt his benefits." On the other hand, the panel concluded that in Count IV Hunt wanted a "money judgment" or "legal" relief where he sought "judgment against Defendants jointly and severally for payment of his benefits. This conclusion is contrary to the clear language of ERISA regarding "money judgments" as set forth above. Additionally, under ERISA, a civil action may be brought:

> to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of his plan, or to clarify his rights to future benefits under the terms of the plan; (emphasis added). 29 U.S.C. § 1132(a)(1)(B).

Even the specific wording of Count IV does not request a money judgment; it requests payment of his

benefits. Both counts were brought pursuant to section 502(a)(1)(B) of ERISA, which the Eleventh Circuit panel at Pet. App. 40a found were treated in this circuit as equitable actions "to recover benefits." The panel even cited to Shannon v. Jack Eckerd Corp., 113 F.3d 208, 209-210 (11th Cir. 1997), quoting: "(denying appeal of district court's judgment ordering plan administrators to pay benefits to plan participants)" (Emphasis supplied.) There is no distinction between what the Eleventh Circuit panel itself quoted and that of Judge Stafford in the District Court's order to "enter judgment in favor of Harry Hunt in the amount of $352,748.74 plus costs. The judgment shall be paid from the [P]lan [F]und."

Count IV was brought pursuant to ERISA and is entitled "Recovery of Benefits as to the TAC, Hawthorne and the B-Plan" and Hunt alleges damage from the failure of the defendants to pay his lump sum benefits. As the District Court found, "Under ERISA, a civil action may be brought by a participant 'to recover benefits due to him under the terms of his plan'...29 U.S.C. § 1132(a)(1)(B). The Eleventh Circuit panel also seemingly ignored the District Court's reasonable interpretation that in both Counts II and IV, Hunt sought "payment of his lump sum benefit, application for which was approved by Eastern on April 22, 1991." The Eleventh Circuit panel failed to conclude that such findings were clearly erroneous.

### C. THE PANEL'S DECISION CONFLICTS WITH THE ELEVENTH CIRCUIT'S HOLDING IN FINE V. SEMET, 699 F.2D 1091 (11TH CIR. 1983) REGARDING ALLOCATION OF BURDEN OF PROOF.

The Eleventh Circuit panel concluded that the TAC, assuming it was somehow entitled to impose the moratorium, did not violate arbitrary and capricious standards. However,

the Eleventh Circuit panel substituted its findings for the District Court's findings that there were sufficient funds to pay Hunt and that the B-Plan and the TAC were obligated to provide more than speculation and conjecture as to the numbers of eligible pilots able to claim lump sum payments having filed after January 18, 1991, and before June 30, 1992, the effective date of Document 91C.

This Circuit, under Fine, held that the plan fiduciary had the burden of demonstrating that its actions were consistent with its fiduciary duties under ERISA. (The plan fiduciary demonstrated that the specific payment to the specific plan participant would have "a greater impact on the plan's assets as a whole than had previous requests.") Id. No such showing was made in this instant case.

Judge Stafford of the District Court, who participated in the questioning of former Citicorp president William Spencer, a member of the TAC, concluded that the TAC was properly concerned with the state of its liquid assets given the history of lump sum payments and the difficult status of the Plan's substantial real estate investments. However, upon learning that an actuary regularly kept track of participant retirement accounts and submitted reports to the TAC about amounts available and needed to pay plan participants, the District Court concluded that the TAC did not present any evidence whatsoever that imposition of the moratorium was actuarially justified.

Under the Eleventh Circuit's holding in Fine, the TAC and/or the Plan should have demonstrated that of the 2,500 pilots impacted, the number that were eligible for lump sum benefits; the number who had, like Hunt, applied prior to the June 30, 1992 implementation of Document 91C; the number who, like Hunt, had been approved by Eastern; the number who, like Hunt, would have received payment of their lump sum benefit; the combined total of such payments; and the actual impact that payment of these funds would

have had on the Fund. The writ is required to resolve this conflict regarding the burden of proof.

### D. THE DECISION BY THE ELEVENTH CIRCUIT PANEL IS IN CONFLICT WITH THE PURPOSE OF ERISA

The Eleventh Circuit panel's conclusion is in conflict with the Supreme Court's holdings in Boggs v. Boggs, 117 S.Ct. 1754 (1997) (cited by the panel) that the principal object of [ERISA] is to protect plan participants and beneficiaries; and Central States et al. v. Central Transport, Inc., et al., 472 U.S. 559, 569; 105 S.Ct. 2833, 2840 (1985) rehearing denied, 473 U.S. 926, 106 S.Ct. 17 (1985), citing Nachman Corporation v. Pension Benefit Guaranty Corporation, 446 U.S. 359, 100 S.Ct. 1723, 64 L.Ed 2d 354 (1980), rehearing denied, 448 U.S. 908, 100 S.Ct. 3051 (1980):

> "...one of ERISA's principal purposes was to mak[e] sure that if a worker has been promised a defined pension benefit upon retirement - and if he has fulfilled whatever conditions are required to obtain a vested benefit - he actually will receive it."

The effect of the Eleventh Circuit panel's ruling denies Hunt payment of his lump sum benefit without proof as to the impact of that payment (and if others had been shown to be similarly situated to Hunt, the impact of those payments) on the Fund and creates conflict with those decisions cited above.

The panel further created conflict with the referenced decisions by failing to consider the termination of the moratorium. The parties' briefs, the District Court's order, and the panel's findings clearly demonstrate that Eastern Air Lines ceased doing business on January 18, 1991; that in late

January and early February (although not authorized by Plan documents, or by Eastern or ALPA) the TAC unilaterally declared a moratorium on payment of lump sum benefits for all plan participants seeking such benefits after January 18, 1991. As demonstrated above, Hunt filed for on February 5, 1991, for a retirement date of March 1, 1991, and was approved by Eastern on April 22, 1991. But for the moratorium, he would have received $352,748.74 based on the actuary's statement.

This "temporary suspension," as defined by Oxford's Desk Dictionary, American Edition 1995, effectively terminated with the approval in November 1992 of Document 91C to the Plan, which created certain options for those entitled to lump sum options. As evident from Document 91C, and from the findings of the Eleventh Circuit panel, this amendment to the Plan became effective retroactive to June 30, 1992. Document 91C **was not** made retroactive to January 18, 1991, or to February 5, 1991, or even to March 1, 1991. There is no dispute that the moratorium ended with the adoption of Document 91C on June 30, 1992.

As found by the Eleventh Circuit panel, Hunt has not elected any benefits under Document 91C; nor is he compelled to do so. Hunt applied for and was approved for payment of his lump sum benefit with an effective retirement date of March 1, 1991. The termination of the moratorium by implementation of Document 91C and the effective date of Document 91C being June 30, 1992, allows Hunt to now receive the lump sum benefit to which Judge Stafford in the District Court concluded, and all parties admit, he was entitled to but for the moratorium.

The Eleventh Circuit panel's failure to consider the effect of the termination of the moratorium, effectively denying Hunt's benefits, creates a conflict with the referenced cases holding that the primary purpose of ERISA

is to ensure that those having qualified for a stated benefit, receive that benefit. Boggs, Central States, Nachman, supra.

## CONCLUSION

The findings and conclusions of the Eleventh Circuit Panel which, as demonstrated above, create conflicts with prior decisions by the U. S. Supreme Court, and those rendered from the Eleventh Circuit Court, including decisions regarding the Appellate Court's scope of review. In reversing the District Court decision, the Eleventh Circuit panel has effectively denied Captain Hunt benefits to which he is entitled. This ruling by the Eleventh Circuit panel also impacts other "ERISA" retirement plans where the plan participants find themselves in a similar situation as Hunt.

For the foregoing reasons, the petition for writ of certiorari should be granted.

# APPENDIX

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 95-2078

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D. C. Docket No. 92-40064-WS

HARRY L. HUNT,

Plaintiff-Appellee, Cross-Appellant,

versus

HAWTHORNE ASSOCIATES, INC.,

Defendant,

EASTERN AIR LINES VARIABLE BENEFIT RETIREMENT PLAN FOR PILOTS; TRUST ADMINISTRATIVE COMMITTEE OF THE EASTERN AIR LINES VARIABLE BENEFIT RETIREMENT PLAN FOR PILOTS

Defendants-Appellants, Cross-Appellees.

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Appeals from the United States District Court
for the Northern District of Florida

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Argued January 9, 1996 -- Decided August 5, 1997

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Before TJOFLAT and COX, Circuit Judges, and CLARK, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

Harry L. Hunt is a retired Eastern Air Lines ("Eastern") pilot seeking to recover a lump-sum retirement benefit under the Eastern Air Lines Variable Benefit Retirement Plan for Pilots (the "Plan").[1] Eastern, the Plan's administrator, which is a debtor before the Bankruptcy Court for the Southern District of New York, has refused to pay the benefit because the Plan has been amended, with the approval of the bankruptcy court, to foreclose the lump-sum benefit Hunt seeks. As the Plan now stands, Hunt is entitled to receive only a modified lump-sum benefit: he may receive a partial distribution immediately and subsequent payments over time as the Plan's assets are liquidated.

Hunt rejected this modified lump-sum benefit, as well as other payment options provided under the Plan, and sued Eastern; the Air Line Pilots Association ("ALPA"), the pilots' union; Charles H. Copeland, the Chairman of the Trust Administrative Committee (the "TAC"), the Plan's named fiduciary; Paul M. O'Connor, Jr., of O'Connor, Morris & Jones, the TAC's legal counsel (the "O'Connor law firm"); and Hawthorne Associates, Inc. ("Hawthorne"), the TAC's principal investment advisor, to recover his retirement benefit in a lump sum. Hunt brought his suit under the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829, 29 U.S.C. §§ 1001-1461 (1994). His complaint, framed in six counts, asked for compensatory and punitive damages, injunctive relief in the form of an order requiring the defendants to pay his lump-sum benefit, statutory penalties, and attorneys' fees.

Eastern's Bankruptcy Trustee, in a motion for summary judgment, contended that Eastern could not be held liable to Hunt because it had properly discharged its

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1 The Plan's originating document refers to the plan as the "B-Plan." For simplicity, we use the name "Plan."

responsibilities as administrator under the Plan. Later, when opposing Hunt's motion for leave to filed an amended complaint, Eastern argued that Hunt's claim for a lump-sum benefit had been foreclosed by a bankruptcy court ruling against Hunt in Eastern's bankruptcy case. In an apparent attempt to avoid the effect of this ruling, Hunt voluntarily dismissed Eastern from the case with prejudice and, with leave of court, filed an amended complaint against three defendants -- Hawthorne, the TAC, and the Plan -- that asserted essentially the same claims presented in his initial complaint.

The case was tried to the district court; by that time, the only defendants before the court were the TAC and the Plan. Without referring to the bankruptcy court's ruling against Hunt, the court held that he was entitled to his lump-sum benefit and entered judgment for Hunt in the amount of that benefit. The judgment stated that the benefit was to be satisfied out of the Plan's fund of assets. The court rejected Hunt's remaining claims and entered judgment for the defendants.

The TAC and the Plan now appeal. Hunt cross-appeals the court's rejection of his claim requesting the court to impose a statutory penalty on the defendants. We reverse the court's judgment against the TAC and the Plan, and affirm its judgment on the statutory-penalty claim.

## I.

Hunt claims that, under ERISA and the provisions of the Plan, he is entitled to recover his retirement benefits in a lump sum. Unlike the typical scenario in which a participant in an employee benefit plan sues to recover ERISA benefits, Hunt sought his lump-sum payment while the administrator of the Plan, Eastern, was undergoing a highly publicized bankruptcy proceeding that ultimately resulted in the company's demise. In addition to scrutinizing ERISA and

the provisions and operation of the Plan, we must therefore consider the interrelationship between the Plan and Eastern's bankruptcy in order to evaluate Hunt's claims for relief.

A.

ERISA is a "comprehensive and reticulated statute" that created a framework for the administration and maintenance of private employee benefit plans. Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361, 100 S.Ct. 1723, 1726, 64 L.Ed.2d 354 (1980). The cornerstone of an ERISA plan is the written instrument, which must provide for "the allocation of responsibilities for the operation and administration of the plan." ERISA § 402(b)(2), 29 U.S.C. § 1102(b)(2); see also ERISA 402(a)(1), 29 U.S.C. § 1002(16)(a)(1) ("Every employee benefit plan shall be established and maintained pursuant to a written instrument.").

The written instrument must designate an "administrator," ERISA § 3(16)(A)(i), 29 U.S.C. § 100(16)(A)(i), "to run the plan in accordance with the . . . governing plan documents." Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 115 S.Ct. 1223, 1231, 131 L.Ed.2d 94 (1995); see also Varity Corp. v. Howe, 116 S.Ct. 1065, 1086, 134 L.Ed.2d 130 (1996) ("Essentially, to administer the plan is to implement its provisions and to carry out plan duties imposed by [ERISA].") (Thomas, J., dissenting). In some instances, ERISA imposes specific obligations on the plan administrator. See, e.g., ERISA § 101(b), 29 U.S.C. § 1021(b) (duty to file plan description, modifications and changes, and reports with the Department of Labor); ERISA § 105(a), 29 U.S.C. § 1025(a) (duty to provide plan participants with information regarding their benefits).

The written instrument must also "provide for one or more named fiduciaries who jointly or severally shall have

authority to control and manage the operation and administration of the plan." ERISA § 402(a) (1), 29 U.S. C. § 1102 (a) (1). The administrator, as well as the named fiduciary, is considered a "fiduciary" under ERISA.[2] Both the administrator and the named fiduciary must discharge their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA]," ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), "for the exclusive purpose of providing benefits to participants and their beneficiaries," ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). Because both the plan administrator and named fiduciary must discharge their duties in accordance with the written instrument, we examine the provisions of the Plan in detail.[3]

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2 The term "fiduciary" has a broader meaning under ERISA than at common law because ERISA "defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan." Merten v. Hewitt Associates, 508 U.S. 248, 262, 113 S.Ct. 2063, 2071, 124 L.Ed.2d 161 (1993). Under ERISA § 3 (21)(A), 29 U.S.C § 1002(21) (A), a fiduciary includes not only those who "exercise[] any discretionary authority or discretionary control respecting management of such plan or exercise[] any authority or control respecting management or disposition of its assets," but also those who "[have] discretionary authority or discretionary responsibility in the administration of such plan." The Supreme Court has referred to ERISA's definition of fiduciary as "artificial." Mertens, 508 U.S. at 255 n.5.

3 Given the seminal importance of the written instrument under ERISA, we are puzzled why the parties made little more than a passing reference to the Plan documents in their briefs and at oral argument.

For simplicity and clarity, we refer to the specific provisions of the Plan by citing directly to the relevant section or subsection. In some instances, the title of the section or subsection is noted parenthetically.

B.

The Plan is a variable benefit pension plan for Eastern pilots that was created in 1958 pursuant to a collective bargaining agreement between Eastern and ALPA. The parties rewrote the Plan in the 1970s to comply with ERISA and subsequently amended it in 1986.[4]

The Plan is a "defined contribution plan."[5] According to 26 U.S.C. § 414(i), a defined contribution plan is a "plan [that] provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." More simply, in the words of an ALPA newsletter sent to Eastern pilots, a participant's interest in a defined contribution plan is "determined solely by contributions made in a beneficiary's name and the subsequent investment performance of those contributions." The Plan requires that Eastern make contributions on behalf of each participant, see § 4.1 ("Eastern Contributions"),[6] for

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4 The original written instrument that established the Plan is known as "Document 91." The 1986 amendment is known as "Document 91A."

5 Section 12.14 of the Plan, titled "Plan Is Defined Contribution Plan," states: "Since [the Plan's inception], the Plan has been and continues to be a defined contribution plan." This section appears in Document 91C, an amendment to the Plan that will be discussed in part I.D, infra.

6 According to the original agreement, Eastern was to contribute on behalf of each participant an amount equal to 11% of his compensation. On February 23 1986, Eastern and ALPA signed a collective bargaining agreement that adjusted Eastern's contribution level in two ways: (1) for pilots employed before March 2, 1986, Eastern's contribution was set at 10% effective January 1, 1988; (2) for pilots employed on or after March 2, 1986, Eastern's contribution was set at 3%. In addition, participants had the option of contributing up to 10% of their earnings as "optional additional contributions" to augment their interest in the Plan. See § 4.2 ("Optional Additional Contributions").

investment in stocks, bonds, real estate, and other assets. These investments constitute the Plan's "Variable Fund" (the "Fund"). See § 1.36 ("Variable Fund").[7] As a result, the value of a participant's interest in the Plan depends not only upon the funds contributed but also on the investment return on the Fund's assets. See Borst v. Chevron Corp., 36 F.3d 1308, 1311 n.2 (5th Cir. 1994), cert. denied, 115 S.Ct. 1699, 131 L.Ed.2d 561 (1995). The value of the Fund is calculated annually as of December 31 of each calendar year. See § 5.1 ("Fund Value").

The Plan designates Eastern as the "plan administrator." Eastern has "those powers necessary to carry out the day to day operation of the Plan." See § 2.2(a) ("Administration"). Those powers include the broad responsibility to "initially determine all questions arising from the administration, interpretation, and application of the Plan pursuant to all applicable law, agreements and contracts and such determination shall be binding upon all persons, except as otherwise provided by law, and further provided that each Participant shall be granted the same treatment under similar conditions." Id. The Plan also charges Eastern with the responsibility for, inter alia, keeping records, see § 2.4 ("Records"), preparing and distributing periodic Plan summaries, see § 2.5 ("Plan Summary"), and sending to each participant an annual statement reflecting the value of his investment in the Plan, see § ("Annual Statement"). Section 13.1 of Article XIII, which is titled "Modification, Suspension or Discontinuance," grants Eastern the authority to unilaterally modify, suspend, or discontinue any feature of the Plan, provided that any such action does not "adversely affect" any benefits "already provided" to a participant under

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7 According to § 1.36, the Fund is "the property of the Plan, . . . all of which is held in trust pursuant to Trust Agreement between the [TAC] and State Street Bank and Trust Company . . . and any other trust created for such purpose by the [TAC]."

the Plan. An exercise of this authority, however, would not constitute an amendment to the Plan.[8]

The Plan designates the TAC, a small committee that monitors the management of the Plan's assets,[9] as its "named fiduciary." Under the Plan, the TAC has "overall supervisory responsibility of the administrative functions of the Fund," see § 2.13(b)(i) ("Fund Administration"), and the duty "to maintain surveillance over the status and administration of the Plan and the [Fund]," see § 10.2 (b) ("Rights and Duties of the [TAC]"). It must "regularly and periodically suppl[y]" information to ALPA about "transactional detail, cash flow reports, investment status, documentation and Fund performance," see § 2.11 ("Information and Accountability"), and furnish to ALPA and Plan participants reports about the TAC's "functions, actions, and decisions . . . as are reasonable and appropriate."

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8 The Plan documents do not explicitly describe how the Plan may be formally amended. The closest provision is § 14.1, which states that Eastern and ALPA must agree upon any modification that is necessary for the Plan to qualify as a pension plan under ERISA. See § 14.1 ("Qualification of Plan"). The record makes clear, however, that both Eastern and ALPA must approve any substantive amendment to the Plan, with the exception of an amendment made pursuant to § 1113(e) of the Bankruptcy Code, 11 U.S.C. §1113(e). See infra note 20.

9 The TAC initially consisted of two members selected by ALPA, two members selected by Eastern, and three "outside" members chosen by ALPA and Eastern. By the time of the events involved in the present controversy, the Plan had been amended to provide that two members were to be selected by ALPA, and five outside members would be appointed by the existing TAC members with ALPA's approval. TAC's outside members at this time included former President Gerald R. Ford; a former president of Citicorp, William I. Spencer; a former chairman of the board of Metropolitan Life Insurance Company, George P. Jenkins; and a former dean of the Harvard Business School, Lawrence E. Fouraker.

The compensation for the outside TAC members is paid by the Fund, see § 2.2 (b) (iii), whereas the compensation for TAC members from ALPA is paid by ALPA, see § 10.1(b) (ii).

See § 10.2 (c). Furthermore, the TAC is charged with the responsibility of selecting and replacing investment advisors and trustees of the Fund's assets, see § 2.7(b) ("Trust Agreement and Trustee"), as well as giving directions and instructions to these trustees, see § 2.8 ("Directions to Trustee(s)"). Before selecting or replacing investment advisors or trustees, however, the TAC must notify ALPA of the TAC's planned course of action and give ALPA an opportunity to respond, see § 2.7(b), thus effectively giving ALPA a quasi-veto power over these decisions. Similarly, before giving any notice or instruction to a Fund trustee, the TAC must notify ALPA and give it fifteen days to object. See § 2.8.

Pursuant to its authority under sections 2.7 and 2.13(d),[10] the TAC hired Hawthorne as the Plan's principal investment advisor/manager for the time period relevant in this case. Hawthorne's duties are enumerated in a written "investment advisor agreement" between the TAC and Hawthorne. According to the testimony of Hawthorne's chairman, Charles G. Dyer, Hawthorne assumed many of the TAC's administrative duties involving the Fund and its assets, including the scheduling of TAC meetings and the release of quarterly statement to participants about the value of the Fund's assets. In essence, Hawthorne served "at the pleasure of the [TAC]."

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10 According to § 2.13 (d), the TAC "may delegate to any person, including, but not limited to, Investment Advisors, all or any portion of the [TAC's] powers, duties and responsibilities to establish and maintain a Fund Office, to maintain records and to prepare reports and documentation. The [TAC] shall make such delegations in writing and is authorized to pay reasonable fees, charges and costs of the person or persons providing such service." This delegation of authority is consistent with ERISA. See ERISA § 402(c)(3), 29 U.S.C. § 1102(c)(3).

C.

Since the Plan's inception, an Eastern pilot choosing normal or early retirement could elect to receive his benefits in the form of monthly annuity payments.[11] Beginning in 1983, a retiring pilot also could elect to receive his benefits in the form of a lump-sum payment.

Processing an application for a lump-sum benefit involved five steps.[12] First, a pilot seeking a lump-sum payment would complete the necessary paperwork and inform the Chief Pilot, an Eastern management employee, of his intention to retire. Second, the Chief Pilot would check to make sure that the pilot met age criteria to qualify for normal or early retirement benefits under the Plan.[13] Third, if the pilot met the age qualifications, the Chief Pilot would inform the Eastern Pension and Insurance Department about the pilot's decision to retire. Fourth, the Eastern Pension and Insurance Department would contact the Plan's actuary, William M. Mercer, Inc., which would determine the precise

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11 The Plan provided participants with a panoply of annuity options. Retiring pilots selecting an annuity could choose from the post-retirement joint and survivor annuity, the contingent annuity, the level income option, the life annuity option, and the deferred payment option. See § 6.2 ("Available Forms of Payment"). There also was a disability benefit option. See § 6.3 ("Disability Benefit").

12 The Plan does not explicitly set forth the procedure for processing claims for retirement benefits. The above account of the claims-processing procedure is taken from the deposition and affidavit of Charles Dyer of Hawthorne and from the affidavit of Brian P. White, who served as Director of the Eastern Pension and Insurance Department. Both accounts of Eastern's claims - processing procedure are virtually identical. After the trial, the district court, in fashioning its order directing the entry of judgment, relied exclusively on the account given in the White affidavit.

13 Normal retirement age under the Plan is 60. See § 1.22 ("Normal Retirement Age"). The minimum early retirement age is 50. See §1.15 ("Early Retirement Date").

amount of benefits to which the retiring pilot was entitled. Fifth, the actuary would then give that information to the State Street Bank & Trust Company, a Plan trustee, which would make the distribution to the pilot. The lump-sum payment would be equal to the entire actuarial present value[14] of the pilot's accrued benefit[15] as of his effective retirement date.[16] See § 6.2(e)(i) ("Lump Sum Option"). A pilot dissatisfied with the disposition of his application for benefits could pursue administrative relief with the Pension Dispute Board pursuant to Article XI ("Determination of Disputes") of the Plan.[17]

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14 "Actuarial present value" is the current value of monthly benefits determined by the current value of an annuity unit at the most recent valuation. See § 1.6 ("Actuarial Present Value").

15 An "accrued benefit" is essentially the total number of "annuity units" credited to the account of a participant. See § 1.2 ("Accrued Benefit"). An annuity unit is a unit of measure representing a share in the Fund. See § 1.7 ("Annuity Unit").

16 "Effective retirement date" essentially means the normal retirement date or early retirement date. See § 1.18 ("Effective Retirement Date"). The normal retirement date is the first day of the month coinciding with or otherwise next following a participant's 60th birthday. See § 1.23 ("Normal Retirement Date"). The early retirement date is the first day of the month on which a participant elects to retire and receive a pension, provided that he is at least 50 years old. See § 1.15(a) ("Early Retirement Date").

17 The Pension Dispute Board consisted of four members: two were selected by Eastern and two were selected by ALPA. The Board had the authority to hear and determine "[a]ll disputes concerning the application, interpretation or administration of the Plan in respect to individual employees and their participation in or their benefits under the Plan." § 11.2 ("Authority [of Pension Dispute Board]").

D.

In the late 1980s, Eastern was experiencing severe financial difficulties against the backdrop of a highly publicized labor dispute. On March 9, 1989, Eastern filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-1174, in the Bankruptcy Court for the Southern District of New York. On March 20, 1990, Eastern and ALPA signed an interim letter of agreement, effective March 2, 1990, fixing Eastern's contribution to the Plan for all pilots at 3% of compensation.[18] On April 18, 1990, the bankruptcy court named Martin R. Shugrue as Bankruptcy Trustee of Eastern (the "Bankruptcy Trustee"). The Bankruptcy Trustee began liquidating certain company assets in an attempt to reorganize Eastern as a smaller carrier.[19]

On September 11, 1990, the Bankruptcy Trustee, proceeding under section 1113(e) of the Bankruptcy Code, applied to the bankruptcy court for an order, which the court entered, approving an amendment to the Plan.[20] Pursuant to this order, Eastern reduced its contribution to the Plan to 0% for compensation earned by pilots after August 11, 1990, and provided for resumption of its contribution of 3% for such

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18 For Eastern pilots employed before March 2, 1986, Eastern had been contributing 10% of compensation since January 1, 1988. See supra note 6.

19 The record indicates that the Eastern Pension and Insurance Department retained its authority and continued to perform its responsibilities under the supervision of the Bankruptcy Trustee.

20 Section 1113(e) of the Bankruptcy Code, 11 U.S.C. § 1113(e), states that the bankruptcy court, "after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement." The bankruptcy court may authorize such measures only if they occur "during a period when the collective bargaining agreement continues in effect," and "if [such measures are] essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate."

compensation on or after June 1, 1991. This amendment also suspended the Pension Dispute Board's powers effective August 11, 1991. ALPA objected to the Bankruptcy Trustee's action and appealed to the district court the bankruptcy court's order authorizing this amendment. The record does not inform us of the district court's disposition of this appeal.

After Eastern's Chapter 11 filing, the Fund became increasingly illiquid due to three factors. First, because Eastern had suspended and eventually ceased making contributions to the Plan, the Fund's sole source of case was the return on its investments. Second, a substantial portion of the Fund's assets were invested in real estate, which was depressed in value due to a nationwide real estate recession. Third, the lump-sum option for receiving benefits had become increasingly popular with retiring pilots. In fact, the annual amount distributed in lump-sum payments had risen steadily from $52,000,000 in 1986 to more than $200,000,000 in 1990.

On January 18, 1991, Eastern shut down its operations, effectively retiring the approximately 2,500 pilots in its employ at the time. The same day, O'Connor of the O'Connor law firm, which served as counsel to the TAC, contacted Brian P. White, Director of Eastern's Pension and Insurance Department, and told White that the TAC "recommended" that Eastern place a temporary moratorium on lump-sum payments. White, in response, said that Eastern lacked the authority to impose a moratorium. On January 19, 1991, O'Connor confirmed the recommendation by letter, a copy of which he sent to ALPA, the TAC, and Hawthorne.

On January 27, 1991, according to the deposition testimony of former President Gerald R. Ford, the TAC

voted unanimously to impose the temporary moratorium.[21] The record does not disclose how the TAC planned to implement the moratorium.

On January 28, 1991, O'Connor, representatives of ALPA and Eastern and their respective attorneys,[22] met to discuss the need to place a temporary moratorium on lump-sum payments. The record does not disclose whether at this meeting the parties discussed Article XIII of the Plan, which gives Eastern the power to "modify, suspend . . . or discontinu[e] . . . any feature [of the Plan]."

On February 1, 1991, the TAC issued a "Certificate of Action of the [TAC of the Plan] Taken upon unanimous Written Consent." In this document, the TAC stated that it, "as named fiduciary of the [Plan], has decided to, and hereby does, impose a temporary moratorium upon the payment of benefits to all Eastern pilots who shall file requests for benefits after the close of business on January 18, 1991.[23] This Certificate also instructed O'Connor to "notify [Eastern] of the [TAC's] request that Eastern, as [Plan] Administrator, promptly notify all Eastern pilots who shall file requests for benefits after the close of business on January 18, 1991, that, until further notice, a temporary moratorium has been placed in effect by [the TAC]." Pursuant to the TAC's request, Eastern mailed notice of the

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21 In his deposition, former President Ford, a member of the TAC at the time the moratorium was imposed, see supra note 9, stated that "[the decision to impose the moratorium] was unanimous between Mr. Spencer, Mr. Jenkins, Mr. Fouraker, the [ALPA] members, and myself."

22 The record does not indicate whether the Bankruptcy Trustee was present, or represented, at the meeting.

23 The moratorium did not affect participants who were already receiving annuities or who had submitted their application for a lump benefit by the close of business on January 18, 1991.

moratorium to all of its pilots on February 4, 1991.[24] In this notice, Eastern advised pilots that "[q]uestions regarding the temporary moratorium should be addressed to the [TAC]" at one of the following addresses: (1) the TAC, care of the O'Connor law firm; or (2) the TAC, care of Hawthorne.

White stated that, after Eastern's shutdown and the commencement of the moratorium, the procedure for processing claims for benefits under the Plan remained the same except for two changes: (1) the retiring pilot would contact Eastern's Pension and Insurance Department directly rather than go through the Chief Pilot; and (2) Eastern's Pension and Insurance Department would inform the actuary whether a participant had applied for benefits following the shutdown. If the participant had applied after the shutdown, the bank would not issue a benefit check.

On May 22, 1991, the TAC mailed a letter and a videotape to all Plan participants and beneficiaries. The letter and videotape were designed to inform these parties about the current status of the Plan and its plans for the future in light of the "present liquidity issues confronting the [Plan]" -- that is, the state of the Plan after Eastern's shutdown and bankruptcy.

On June 25, 1991, the Bankruptcy Trustee and ALPA modified the Plan by letter of agreement.[25] This agreement modified the Plan in three significant ways. First, the Plan provided for a periodic-payment option that enabled participants to receive their retirement benefit in substantially equal monthly payments that were made for life (or life expectancy). See § 6.11 ("Periodic Payments"). These payments would be exempt from the ten percent additional tax assessed on early distributions from qualified

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24 This mailed consisted of two documents: (1) a brief cover letter printed on Eastern stationery; and (2) a two-page notice about the moratorium signed by the TAC and addressed to all Eastern pilots.

25 This agreement is known as "Document 91B."

retirement plans.[26] Second, a new article (Article XV) was added in order to enable participants to take out loans from the Plan during this time of financial uncertainty.[27] The amendment provided that the TAC would serve as administrator for these two provisions; Eastern, however, retained its administrative authority for all other provisions of the Plan. See §§ 6.11(f), 15.1. Third, the Plan was amended to provide that the value of benefits distributed from the Plan was to be determined at the time of distribution. Thus, the value of a participant's lump-sum benefit would no longer be determined as of the effective retirement date. See § 6.2(e)(i).

On July 27, 1992, pending approval by the bankruptcy court, the Bankruptcy Trustee and ALPA entered into a letter of agreement once again. Referred to as Document 91C, this proposed amendment would make two fundamental changes to the Plan. First, the Fund would be divided into a liquid portion (i.e., cash, marketable stocks, and bonds) and an illiquid portion (i.e., real estate,

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26 Under the "periodic payment" option, a participant could elect to receive the actuarial present value of his accrued benefit in the form of periodic monthly payments as described in I.R.C. § 72(t) (2) (A) (iv), 26 U.S.C. 72 (t) (2) (A) (iv); under this option, the benefit amount was determined as of the date of receipt. Participants who were receiving an annuity or had an outstanding balance on a loan from the Fund were not eligible for this option. If the periodic-payment arrangement was discontinued or altered within five years after it started or before the participant reached age 59.5, whichever was later, the participant's subsequent election of another form of benefit from the Plan would trigger the 10% penalty tax normally associated with premature distributions, unless the participant was 55 or older when separating from Eastern. If the penalty tax was triggered, it would be applied retroactively to those amounts previously withdrawn. See § 6.11.

27 Participants who were annuitants or periodic-payment recipients were not eligible to receive loans from the Plan. The maximum loan that could be made was the lesser of $50,000 or 25% of the actuarial present value of the participant's accrued benefit at the time of loan. See § 15.4 ("Plan Loans").

alternative investments, and working capital). Each Plan participant would have a percentage interest in both the liquid and illiquid portions of the Fund rather than an interest in the Fund as a whole. Second, the lump-sum option was modified to provide for a partial distribution -- that is, an immediate cash payment equal to the liquid portion of each eligible participant's account. A participant selecting this option also would receive extended payments over time as the real estate and other illiquid assets were sold. The modified lump-sum option had become feasible because of recent favorable changes in the tax code for partial distributions.[28]

On August 19, 1992, pursuant to its duties under section 10.2(c), the TAC sent a letter to all Plan participants to describe the modified lump-sum option and to explain why the moratorium had been imposed:

> The lump sum option in the [Plan] has been modified by Document 91-C to address the reality that the [Plan] has a substantial amount of high quality illiquid assets that cannot be liquidated quickly without suffering a substantial discount in order to achieve a quick sale. The [Plan] does not have sufficient cash and other liquid assets to allow eligible participants to take their lump sum in cash. This is what caused the imposition of the moratorium in January 1991.

On October 1, 1992, the Bankruptcy Trustee and ALPA filed a joint motion in the Bankruptcy Court for the Southern District of New York seeking approval of the

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28 Effective January 1, 1993, partial distributions from a qualified pension plan could be rolled over into an individual retirement account ("IRA") without adverse tax consequences. See 26 U.S.C § 402(c) (4) (1993). Before this change, a participant could not roll over a partial distribution into an IRA without significant tax liability. See 26 U.S.C. § 402 (a) (5) (D) (1991).

amendment provided by Document 91C. On November 13, 1991, the bankruptcy court granted their motion and approved the amendment to the Plan, effectively ending the moratorium. The operative date of the Document 91C amendment was June 30, 1992.

II.

A.

Harry Hunt worked as a pilot for Eastern for twenty-four years. He elected to retire effective March 1, 1991, and demands that he be paid a lump-sum benefit for the value of his interest in the Plan as of that date.[29] On February 22, 1991, Eastern's Pension and Insurance Department received his application for benefits, which was signed by Hunt on February 5, 1991. On April 22, 1991, the manager of Eastern's Pension Administration Department, Ms. S. W. Boles,[30] approved Hunt's application and authorized payment of his benefits.[31] Given Eastern's instruction to the actuary that it apply the moratorium to those applications submitted after January 18, 1991, the State Street Bank and Trust never made any payment to Hunt. Although Hunt is eligible to receive a modified lump-sum benefit and future

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29 The parties agree that the value of Hunt's accrued benefit in the Fund as of March 1, 1991, was $352,748.74.

30 The record does not disclose the relationship between Eastern's Pension and Insurance Department and Eastern's Pension Administration Department. Given the facts before us, we assume that the latter department carried out the policies and directives of the former department.

31 Hunt's application requested that his lump sum be rolled over into his IRA at Dean Witter Reynolds, Inc. If a lump-sum distribution was rolled over into an IRA or other eligible retirement plan within 60 days, the lump-sum payment would not be included in gross income for the taxable year in which paid. See I.R.C. § 402(a)(5), 26 U.S.C. § 402(a)(5) (1991).

payments in accordance with the Document 91C amendment, he has refused to elect that option. In addition, Hunt did not select the periodic-payment option nor did he take out a loan from the Plan.

Dissatisfied with the progress of his application, Hunt dispatched four letters, the first by himself and the other three through two different attorneys. He alleges that these letters were sent pursuant to the instructions in Eastern's February 4, 1991, letter to all Eastern pilots. On March 15, 1991, Hunt wrote to Charles G. Dyer, the chairman of Hawthorne, to inquire about the status of his pension.[32] On March 20, 1991, through the first of three attorneys whom Hunt employed in this controversy,[33] he wrote to O'Connor in order to request the most current statement of his account and the most recent financial statement for the Plan "showing [its] assets and liabilities." On July 15, 1991, through a second attorney, he wrote another letter to Dyer of

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32 In this letter, Hunt expressed his extreme dissatisfaction with the moratorium, Hawthorne, and the TAC. He stated among other things: (1) "I have just been informed . . . that the proposed moratorium could be extensive. THIS IS COMPLETELY UNSATISFACTORY! (Emphasis in original) (2) "[Hawthorne] is administering a Plan that is already funded and in place. It would appear the delays are 'stalling tactics' to financially injure [those] participants who were working on January 18." (3) "The proposal that the [TAC] will adopt changes or amend the provisions of the [Plan] after [Eastern] had ceased business is ridiculous. The Plan was established and funded long before the demise of the Airline." (4) "The possibility of offering partial payments or '[Plan] loans' is completely unsatisfactory to me. If I want to borrow money, I go to a bank. Banks lend money, and retirement funds were established to provide retirement benefits to their participants. If the various members need cash then they should apply to a bank, -- banks lend money!"

33 The first lawyer whom Hunt employed wrote the letter of March 20, 1991. The second lawyer wrote the July 15 and August 19, 1991, letters described in the text above. The third lawyer employed by Hunt brought the instant law suit and prosecuted it in the district court and on this appeal; a lawyer in his firm assisted him with this appeal.

Hawthorne. In that letter, he requested a statement of "the TAC's position on his application," copies of all amendments to the Plan affecting his benefits, an explanation if the TAC were to deny his application, and the name, address, and the forms necessary to file a claim with the Pension Dispute Board if the TAC decided not to pay his lump sum. Hunt also sent a copy of this letter to the then-chairman of the TAC. Finally, on August 19, 1991, the same attorney wrote on Hunt's behalf to O'Connor to request copies of the "amendments to the Plan," an explanation of whether the TAC "had the right to amend the [Plan]," and a statement disclosing the number of applications for lump-sum benefits filed since January 18, 1991.[34] Hunt complains that none of his letters were answered.

B.

On February 21, 1992, Hunt filed a complaint in the United States District Court for the Northern District of Florida against the following parties: Eastern, ALPA, Hawthorne, Charles H. Copeland as chairman of the TAC, and O'Connor as partner and agent for the O'Connor law

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34 On August 23, 1991, in response to a purported "request" by his Congressman, Hunt sent a letter to Mr. Stephen Mayle of the Office of Filings, Information, and Consumer Services of the United States Securities and Exchange Commission. He made, inter alia, the following statements: (1) "I believe Mr. Dyer [of Hawthorne] and the [TAC], which is packed with [ALPA] [r]epresentatives, are trying to prevent these lump sum payouts by arbitrarily modifying the retirement agreements so as to prevent the retiree from moving his account to other fund managers or IRA retirement programs of their choice." (2) "I request your expeditious assistance in investigating Mr. Dyer's activities as the Fund Manager to determine if he is in violation of Security and Exchange Commission Rules relating to investment fund managers and request your prompt reply regarding your findings in this matter."

firm. The complaint was a typical "shotgun" pleading.[35] With the exception of Count I, Hunt made only general references to "ERISA," failing to indicate which provision of the statute served as his basis for relief.

The complaint contained six counts or causes of action. Each incorporated the allegations, mostly factual, set out in the first twenty-four paragraphs of the complaint. In those paragraphs, Hunt made essentially the following allegations:

> he was a participant in the Plan;
>
> on February 5, 1991, he mailed to the Plan administrator's (Eastern's) Pension and Insurance Department a "Notice of Retirement Status, electing a lump sum payout of his benefits under the [Plan], effective on his early retirement date of March 1, 1991";

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35 See, e.g., Ebrahimi v. City of Huntsville Bd. Of Educ., 114 F.3d 162, ____(11th Cir. 1997); Anderson v. District Bd. Of Trustees, 77 F.3d 364, 366-67 (11th Cir. 1996). As such, the complaint was not the model of clarity and precision necessary to enable the defendants to frame a responsive pleading. The district court would have been within its rights had it stricken the pleading on its own initiative and required a repleader. Ebrahimi, 114 F.3d 162 at __; Anderson, 77 F.3d at 367 n.5; Cesnik v. Edgewood Baptist Church, 88 F.3d 902, 907 n. 13 (11th Cir. 1996), cert. denied, 117 S.Ct. 946, 136 L.Ed.2d 834 (1997). As we relate infra, the court subsequently took such action when Hunt's attorney moved the court for leave to file an amended complaint, which amounted to nothing more than a rehash of the original complaint. The court denied his motion with leave to file an amended complaint that did not suffer from "some of the same infirmities contained in his original complaint." Hunt's attorney thereafter filed an amended complaint, but it constituted no improvement over his original pleading. Unfortunately, rather than striking the amended complaint from the record, the court accepted it. As a result, Hunt's claims remained ambiguous and in part inconsistent, the issues were not properly delineated, and the trial yielded the erroneous decision we set aside today.

> he inquired of Hawthorne on March 15, 1991, May 3, 1991, and May 7,1991 as to when he would receive his lump-sum payment for his accrued benefit;
>
> Hawthorne replied that he would be paid between June 15, 1991, and June 30, 1991;
>
> the Plan administrator had not paid his benefit because a moratorium had been placed on the payment of lump-sum benefits;
>
> the "moratorium resulted from resolutions rendered by ALPA"; and
>
> he retained counsel in order to obtain his lump-sum benefit.[36]

Count I of the complaint, titled "Failure to Provide Information," alleged that the defendants' failure "to respond within 30 days to repeated written requests made by Hunt since March 20, 1991, as required by 29 U.S.C. § 1132(c)(1)(B)," rendered the defendants "liable to Hunt in an amount up to $100 per day from the date of this failure to respond pursuant to [section] 1132(c)(1)(B)." Accordingly, Hunt requested "judgment against Defendants for the applicable penalty and damages, . . . such further relief as the court deems appropriate and prejudgment interest, costs and reasonable attorneys' fees."

Count II, titled "Action to Enforce Rights under [Plan]," alleged that Hunt had properly submitted his request for a lump-sum benefit; that he was entitled to the benefit; and that the "Defendants have failed to pay or direct payment of said benefits and have failed to provide any disposition of Hunt's claim." Accordingly, Hunt asked the

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36 Hunt also alleged that he "relied on [Hawthorne's] representations [that he would receive his benefits between June 15 and 30, 1991] and on the terms of the Plan in establishing his business and activities following his retirement [from Eastern]."

court to "enter an order requiring Defendants to pay Hunt his benefits and award to him prejudgment interest, costs and reasonable attorneys' fees."

Count III, titled "Breach of Fiduciary Duty," alleged in pertinent part:

> the defendants were fiduciaries under ERISA;
>
> "ALPA has a duty not to interfere with Hunt's interest";
>
> "[t]he value of Hunt's Plan account continues to decrease since his effective retirement date";
>
> the defendants "willfully and wantonly breached their fiduciary duty to Hunt by failing to pay [his lump-sum benefit], and by failing to discharge their duties solely in the interest of the participants for the exclusive purpose of providing benefits in accordance with the [Plan] documents'';
>
> the decision to impose the moratorium on lump-sum benefits was "arbitrary and capricious, [was] contrary to the terms of the [Plan] and [was] contrary to law"; and
>
> "[a]s a result of Defendants' breach of the fiduciary duties, Hunt has been damaged by failing to receive his lump sum payout and the resulting payment of increased interest expense for loans obtained pending payment."

Accordingly, Hunt demanded "compensatory and punitive damages against Defendants jointly and severally and request[ed] entry of an order awarding to him prejudgment interest, costs and reasonable attorneys' fees."

Count IV, titled "Recovery of Benefits," alleged that "Hunt has been damaged by Defendants' failure to pay Hunt

the benefits to which he is entitled under the [Plan]." Accordingly, Hunt demanded "judgment against Defendants jointly and severally for payment of his benefits under the [Plan], plus prejudgment interest, costs and attorneys' fees."

Count V, titled "Estoppel," alleged in pertinent part:

> "Defendants represented to Hunt that he was fully vested, that the [Plan] was fully funded, and that his benefits would be paid before June 30, 1991";
>
> "Hunt relied on the terms of the [Plan] and on the representation of Defendants in determining his retirement date and in establishing his business plan and financial affairs upon retirement"; and
>
> "Defendants should be estopped to deny payment and to refuse to process payment to Hunt."

Accordingly, Hunt demanded "judgment against Defendants jointly and severally for payment of his benefits under the [Plan], plus prejudgment interest, costs and attorneys' fees."

Count VI, titled "Declaratory Judgment," alleged that the defendants "failure to pay to Hunt the benefits to which he is entitled as set forth in the [Plan] have raised dispute regarding Hunt's entitlement (right) to immediate payment of the [Plan] benefits under the terms of the [Plan] and ERISA" and that "Chapter 86 Fla. Stat.[ ] provides that such rights may be determined by the court." Accordingly, Hunt requested that "this court enter an order declaring his right to payment of his lump sum [Plan] benefits under the terms of the [Plan] and pursuant to ERISA and awarding to Hunt costs of this proceeding, including reasonable attorneys' fees."

The defendants, proceeding individually, responded to Hunt's complaint. Hawthorne and the Bankruptcy

Trustee, who appeared for Eastern, filed answers that denied liability and included the affirmative defense that the complaint failed to state a claim for relief. The remaining defendants, with the exception of Copeland, moved to dismiss the complaint under Fed. R. Civ. P.12(b)(6) for failure to state a claim for relief;[37] Copeland moved for dismissal on the ground that Hunt had not served him with process as required by Fed. R. Civ. P. 4(j).[38] Because Hunt had "demonstrated neither good reason for Copeland's continued presence in this lawsuit nor good cause for the lack of timely service upon Copeland," the court dismissed Copeland from the case.[39]

Before the court could address the question whether the complaint stated a claim for relief against any of the defendants, the Bankruptcy Trustee moved the district court on August 5, 1992, for summary judgment on the grounds, among others, that Eastern was not a fiduciary under the Plan because its duties were purely ministerial; that Eastern lacked discretion to impose the moratorium; and that the moratorium was imposed at the TAC's direction. Although the Plan contained no provision requiring Eastern to accept the TAC's decisions as binding, Eastern contended that it "had no choice but to abide by" the TAC's decision to impose a moratorium on the payment of lump-sum benefits.

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37 ALPA filed alternative motions to dismiss and for summary judgment.

38 Fed. R. Civ. P. 4(j), now Fed. R. Civ. P. 4(m), provided in pertinent part:

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

39 The district court issued its order dismissing Copeland from the case on January 4, 1993.

Finally, Eastern contended that "its sole obligation in the retirement benefits process is limited to determining eligibility, here whether an applicant meets the age criteria." "Once this is done," Eastern argued, "[it] has no role in deciding whether to pay an eligible participant benefits, what benefits an eligible participant is entitled to, or how those benefits will be distributed" (emphasis in original).

On October 1, 1992, while this motion for summary judgment and the Rule 12(b)(6) motions to dismiss were still pending, the Bankruptcy Trustee and ALPA jointly moved the bankruptcy court for the entry of an order pursuant to 11 U.S.C. § 363 approving the Document 91C amendment to the Plan. See supra part I.D. Their motion advised the bankruptcy court of the following:

> On July 27, 1992, Eastern and ALPA entered into a letter of agreement to amend the [Plan], conditioned on the approval of this Court. Under the agreement, designated as 'Document 91C', the [Plan] would be amended to provide . . . for the segregation of the assets of the [Plan] into liquid and illiquid segments, and would modify the distribution of lump-sum benefits under the [Plan].
>
> Under Document 91C, Eastern would remain both the 'Sponsor' and the 'Administrator' of the [Plan] for purposes of [ERISA]. Eastern and ALPA have been told that one or more groups object to Document 91C, and may file suit challenging its implementation. Because Eastern's ministerial role in the [Plan] is a continuing obligation of the estate, and to provide a single forum to consider the objections to Document 91C, the [Bankruptcy] Trustee and ALPA hereby jointly seek an Order from this Court approving Document 91C under its authority

> to approve contracts made by the [Bankruptcy] Trustee other than in the ordinary course of business. See 11 U.S.C. § 363.

On October 26, 1992, Hunt, acting through his attorney in the instant case, filed with the bankruptcy court an "Objection to Joint Motion for Entry of Order Approving Amendment to [Plan]." The essence of his objection was that "[t]he movants have failed to provide any authority which would permit amendment of the [Plan] in such a manner that would alter or adversely impact Hunt's ability to receive a lump sum payment upon his retirement." According to Hunt, section 13.1 of the Plan precluded any amendment that would "adversely affect the retirement benefits provided to the participant at the time of the modification." Alternatively, Hunt had "no objection to any amendment that excepts or exempts him, or that otherwise permits him to receive his lump sum payout." Finally, Hunt contended that the bankruptcy court lacked jurisdiction over the administration of the Plan because "Eastern's involvement in the [Plan], according to its own representations, is merely ministerial. The motion seeks to elevate and escalate Eastern's involvement in administering the Plan without providing plan participants with any means of participating in Eastern's administration."

On November 13, 1992, the bankruptcy court held a hearing on the Bankruptcy Trustee's and ALPA's joint motion for approval of the Document 91C amendment to the Plan. In addressing objections of Plan participants such as Hunt, the court stated the following:

> It is clear from this record that the objections are not well-founded. The record does support the relief that has been requested, which does give equitable treatment to inherent competing interest to the [Plan]. In any situation such as this there are always

> competing interests. And it is clear from this record that the proposal is equitable.

The bankruptcy court granted the joint motion. According to the Bankruptcy Trustee, neither Hunt nor any other objector appealed this ruling.

On December 4, 1992, following the bankruptcy court's approval of the Document 91C amendment to the lump-sum benefit provision of the Plan, Hunt moved the district court for leave to file an amended complaint. The Bankruptcy Trustee, ALPA, and Hawthorne opposed Hunt's motion in separate filings.[40] The Bankruptcy Trustee and Hawthorne argued that Hunt's motion should be denied on the ground that the bankruptcy court's rejection of Hunt's objection to the approval of the Document 91C amendment barred his claim for a lump-sum benefit. The Bankruptcy Trustee also represented that Hunt "had a full opportunity to address his concerns before the bankruptcy court. Having failed in his efforts before the bankruptcy court, he [was] barred under the doctrine of res judicata from collaterally attacking Document 91C before this [District] Court."[41] ALPA objected to Hunt's proposed amended complaint on the ground that the claims Hunt proposed to assert against it were frivolous.

On February 1,1993, the district court disposed of three of the pending motions. The first two were ALPA's alternative motions to dismiss Hunt's complaint for failure to state a claim for relief and for summary judgment. The court granted both motions. It concluded that ALPA was not an administrator of the Plan and that Hunt's breach of fiduciary

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40 Defendants Copeland and O'Connor did not respond to Hunt's motion.

41 According to the Bankruptcy Trustee, the bankruptcy court heard and rejected Hunt's objection to the approval of the Document 91C amendment on November 13, 1992, and Hunt did not appeal this ruling. Hunt did not contest this representation.

duty claim was improperly asserted; ALPA, therefore, could not have been held liable for any of the relief Hunt sought in Counts I through IV. The court also rejected Hunt's Count V estoppel claim because the complaint failed to allege that Hunt had relied on a representation made by ALPA.

The third motion disposed of was Hunt's motion for leave to file an amended complaint. The court denied that motion "because . . . [the amended complaint Hunt tendered with his motion] suffer[ed] from some of the same infirmities contained in his original complaint." The court did not specify the infirmities in Hunt's original complaint; whatever they were, the court gave Hunt twenty-two days to cure them and to "file an appropriate amended complaint."

C.

On February 24, 1993, Hunt filed an amended complaint. Without obtaining leave of court as required by Fed. R. Civ. P. 21, Hunt dropped from the case four of the defendants named in his original complaint: Eastern, ALPA, Copeland, and O'Connor.[42] He replaced them with two new

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42 Fed. R. Civ. P. 21, "Misjoinder and Non-Joinder of Parties," provides in pertinent part: "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." A plaintiff who has been given leave to file an amended complaint may drop a defendant from the case without obtaining a Rule 21 order if the defendant has not responded to the original complaint with an answer. See generally 3 Moore's Federal Practice, §§ 15.10, 15.11 (3d ed. 1997); 4 Moore's Federal Practice, § 21.02[5][b] (3d ed. 1997) (discussing the interrelationship of Rules 15 and 21 of the Federal Rules of Civil Procedure). ALPA and O'Connor did not answer Hunt's original complaint; ALPA filed alternative motions to dismiss and for summary judgment, and O'Connor filed a motion to dismiss. Hunt, therefore, was not required to file a Rule 21 motion and obtain an order dismissing those defendants from the case. Eastern, however, answered Hunt's original complaint; consequently, Hunt could not drop Eastern from the case without moving the court pursuant to Rule 21 for an order dismissing Eastern "on such terms as are

defendants, the TAC and the Plan, which joined Hawthorne as the defendants in the case. The Bankruptcy Trustee subsequently learned that Hunt had dropped Eastern from the case, and on April 30, 1993, it obtained from Hunt and filed with the court a stipulation that recited:

> Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, plaintiff . . . Hunt and defendant . . . Eastern . .. .hereby agree and stipulate that the above captioned action shall be and hereby is dismissed with prejudice as to Eastern, each party to bear its own costs.[43]

Hunt's amended complaint contained seven counts. With the minor exceptions set out in the margin, the first six counts of the amended complaint simply replicated the allegations and prayers for relief contained in the original complaint. For example, as before, Count I was titled "Failure to Provide Information"; Count II was titled "Action to Enforce Rights under [Plan]:; Count III was titled "Breach of Fiduciary Duty"; Count IV was titled "Recovery of Benefits"; Count V was titled "Estoppel"; and Count VI was titled "Declaratory Judgment."[44]

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just." Hunt was free, however, to obtain Eastern's dismissal from the case by filing with the court a stipulation under Fed. R. Civ. P. 41 (a)(1)(ii). As we observe above and in part III.B, infra, Hunt eventually followed this route, obtaining Eastern's dismissal by entering into a stipulation providing for the dismissal of his claims against Eastern with prejudice.

We note that Hunt did not move the court pursuant to Rule 21 to add the TAC and Plan as defendants. Neither party objected to being added, and thus the matter is not an issue here.

43 The Bankruptcy Trustee's attorney and Hunt's attorney signed the stipulation on April 22, 1993, and April 29, 1993, respectively.

44 The principal difference between the two complaints was that instead of seeking recovery from the parties named as defendants in the original

complaint, the counts of the amended complaint sought relief only from the defendants named in the amended complaint. Other than this difference, the "amended" Count I was an exact duplicate of the original Count I. Count II added the following allegation, which was implicit in the allegations of the original Count II: "These defendants have improperly, and without authority, interfered with Hunt's attempts to receive payment through the imposition of a moratorium, or modification and amendment of the [Plan]."

Count III, the breach of fiduciary duty claim, added the allegations listed below in an attempt to circumvent the dismissal of this claim on the ground that an individual plan participant lacks standing under ERISA to sue a plan fiduciary for money damages. That Hunt lacked standing as a plan participant to bring a breach of fiduciary duty claim against the TAC had previously been brought to the district court's attention, and the court had informed his attorney that Hunt could bring the claim for his own benefit, as opposed to the benefit of all participants. As Hunt's attorney well knew, the right to sue for breach of fiduciary duty belonged to all of the plan's participants as a group. See Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140, 105 S.Ct. 3085, 3089, 87 L.Ed.2d 96 (1985) (finding that recovery for breach of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109, "inures to the benefit of the plan as a whole"). In an effort to shore up the original Count III and persuade the district court to accord him standing for the breach of fiduciary claim, Hunt alleged:

The [Plan] itself is effectively precluded from challenging the fiduciary duties of these defendants in that these defendants are inextricably tied to the [Plan] itself through their roles, activities, insured interest and administration of the [Plan]. Hunt has no other recourse for the actions of these fiduciaries with regard to his interest in the [Plan].

Defendants have willfully and wantonly breached their fiduciary duty to Hunt and to the [Plan] itself, by failing to pay [Plan] benefits to Hunt, by failing to respond to Hunt]s requests for information, by interfering with Hunt's rights to these monies, and by failing to discharge their duties solely in the interest of the participants for the exclusive purpose of providing benefits in accordance with the [Plan] documents (emphasis added).

The new Count III also added this allegation, which followed the replicated allegation that the moratorium was "arbitrary and capricious, [was] contrary to the terms of the [Plan], and [was] contrary to law":

Alternatively, if the moratorium was imposed because of the [Plan's] inability to pay lump sum benefits to retiring employees electing that option, then these Defendants have breached their fiduciary duties to the [Plan] and to Hunt through mismanagement and failure to take such

In the original complaint, twenty-four paragraphs preceded the presentation of the counts. The amended complaint had twenty-five such paragraphs. These paragraphs, compared to their counterparts in the original complaint, differed materially in the following way. After alleging in the original complaint that the Document 91C amendment affecting Hunt's lump-sum benefit had been made by Eastern and ALPA, which were no longer parties in the case, Hunt changed his position and alleged that the TAC, which "renders decisions regarding administration of the [Plan]," was the party responsible for the moratorium rather than Eastern or ALPA. According to Hunt, Eastern and ALPA were "the only entities which can act to amend or modify the[Plan]"; he therefore implied that the moratorium allegedly imposed by the TAC constituted an unauthorized amendment or modification of the Plan.

As noted, the amended complaint added a seventh count to those asserted in the original complaint. Count VII, titled "Injunctive Relief," alleged essentially that the defendants had breached their duty to maintain sufficient "reserves" with which to pay Hunt's lump-sum benefit. It alleged further that

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action to ensure that the [Plan] was adequately funded so as to pay the lump sum benefit option exercised by Hunt.

Finally, the new Count III added this language to its prayer for compensatory and punitive damages: "[I]n the alternative, [Hunt] demands judgment for damages on behalf of the [Plan] in an amount sufficient to fully fund the retirement benefits authorized under the[Plan]."

The sole addition of note to new Count IV was the allegation that the moratorium and the Document 91C amendment to the lump-sum benefit provision, which the bankruptcy court had approved, were "arbitrary, capricious, unreasonable and[] contrary to the provisions of the [Plan]." New Count V, the estoppel claim, added the allegation that the defendants were estopped from enforcing against Hunt the moratorium or the Document 91C amendment. Count VI, the declaratory judgment claim, was renewed verbatim.

> [n]o other parties will be prejudiced by enjoining the imposition of the moratorium, modification or amendment or payments made thereunder beyond keeping sufficient reserves for the payment of Hunt's lump sum benefit; i.e., payments would continue under the [Plan], but defendants would be enjoined from so depleting the liquid portion of the fund that Hunt's total lump sum benefit could be paid.

Accordingly, Hunt "demand[ed] that [the] Court enter an order enjoining payment of benefits under the [Plan] to current beneficiaries, at least to the extent that sufficient funds are retained to pay Hunt's lump sum benefit, interest, costs and attorney's fees."

The TAC and the Plan jointly moved the court to dismiss the counts of the amended complaint on the ground that none stated a claim for relief.[45] In part, they repeated the arguments previously addressed to the sufficiency of Hunt's original complaint and advanced in the Bankruptcy Trustee's and ALPA's objections to Hunt's motion for leave to file an amended complaint. These arguments included the claim that Hunt lacked standing to sue for breach of fiduciary duty and that the moratorium and the bankruptcy court's approval of the Document 91C amendment foreclosed his claim. As for Hunt's claim seeking the $100 per day statutory penalty, these defendants contended that such penalties were assessable only against the administrator of the Plan, Eastern, which had been dismissed from the case with prejudice. Hawthorne answered the complaint with a general denial of liability.

The district court disposed of the joint motion to dismiss the amended complaint in the following manner: the

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45 The TAC and the Plan were represented by the same counsel throughout this case.

court (1) denied the motion to dismiss Count I; (2) denied the motion to dismiss Count II; (3) dismissed Count III to the extent that it sought comprehensive and punitive damages for Hunt, but held that he had standing to sue the TAC for breach of fiduciary duty on behalf of the Plan's participants; (4) denied the motion to dismiss Count IV; (5) dismissed Count V after Hunt conceded that he had no case for estoppel; (6) dismissed Count VI on the ground of ERISA preemption; and (7) denied the motion to dismiss Count VII, although the court was unable to discern -- from what it described as an "inartfully" drafted pleading -- whether Hunt stated a claim for relief.

Following these rulings, the TAC and the Plan answered the amended complaint, denying liability, and then jointly moved for summary judgment. Their motion essentially restated the arguments presented in their motion to dismiss. Hawthorne also moved for summary judgment. It contended, among other things, that Hunt's claim for the lump-sum benefit (Counts II and IV) could be brought only against the Plan and a person or entity, such as the Plan administrator, possessing the authority to order the payment of his benefit. Hawthorne argued that it had no such authority and, thus could not provide the relief sought. In addition, Hawthorne contended that it could not be held liable for breach of fiduciary duty (Count III) because the Plan, the appropriate plaintiff for such a cause of action, was not injured by the failure to pay Hunt his lump-sum benefit.

The court deferred ruling on these motions for summary judgment until the morning that the trial of the case began. In the meantime, Hawthorne settled with Hunt and agreed to the entry of judgment in favor of Hunt on Count I in the sum of $10,000; all other counts against Hawthorne were to be dismissed with prejudice. The court denied the only motion that was pending, the TAC's and the Plan's motion for summary judgment, and the trial commenced.

D.

The case was tried to the court. Five counts from the amended complaint were at issue: Hunt's claim for the $100 per day statutory penalty under Count I; his identical claims under Counts II and IV seeking judgment in the amount of the lump-sum benefit, prejudgment interest, costs, and attorneys' fees; his claim on behalf of the Plan participants for breach of fiduciary duty under Count III; and his request that the TAC and the Plan be enjoined from paying benefits to other participants until they satisfied his claim under Count VII.

After considering the evidence adduced by the parties, the court, in an "Order Directing Entry of Judgment," held as follows:

Count I. The court found that only designated plan administrators are subject to the $100 penalty imposed by ERISA § 502(c), 29 U.S.C. § 1132(c), for failing to respond to a plan-participant's requests for information as required by the statute. Because Hunt had neither established that the TAC was the Plan administrator nor that it had assumed the "information-providing function" of the administrator, the TAC could not be held liable under section 502(c).

Counts II and IV. The court first found that Hunt had properly applied for the lump-sum benefit and that his application had been denied because of the moratorium the TAC had "imposed" unilaterally. The TAC had done so because it concluded that a "moratorium was need to maintain the financial integrity of the [Plan] and to protect the economic interests of all plan participants and beneficiaries." The court then turned to the question whether the TAC had the authority to impose the moratorium for such purpose. Although the Plan did not expressly give the TAC such authority, the court assumed that the common law of trusts did so. Having made that determination, the court addressed the question whether Hunt or the TAC had the

burden of proof regarding the need for the moratorium: it concluded that the TAC had the burden.

With this ruling in hand, the court considered whether the TAC's proof established that "its action was both prudent and necessary to protect the interests of all plan participants and their beneficiaries." The court held that although the moratorium may have been justified, the TAC's proof was insufficient to carry the day. The court therefore gave Hunt judgment on Counts II and IV in the sum of $352,748.74 plus costs.

Count III. The court's findings on this claim are ambiguous. Hunt had alleged that "if the moratorium was imposed [by the TAC] because of the [Plan's] inability to pay lump sum benefits to retiring employees electing that option, then these Defendants have breached their fiduciary duties to the [Plan] and to Hunt through mismanagement and failure to take such action to ensure that the [Plan] was adequately funded so as to pay the lump sum benefit option exercised by Hunt." See supra note 44. In other words, the TAC breached its fiduciary duty to the Plan's participants, and therefore to Hunt, by imposing the moratorium because of its inability to pay the lump-sum benefits.

The court found no such breach: "Hunt submitted neither evidence of mismanagement nor -- assuming, for the sake of argument, that he proved a breach of fiduciary duty -- evidence from which this court could fashion a remedy. Hunt having thus failed to satisfy his burden of proof on Count III, judgment will be entered in favor of the defendants."

Therefore, under the district court's analysis, whether the TAC had breached its fiduciary duty to the Plan participants, including Hunt, by imposing the moratorium turned on which party had the burden of proof. On Counts II and IV, the court held that the TAC had the burden but failed to sustain it by showing that prudence required that a moratorium be imposed. On Count III, the court held that

Hunt had the burden of proof but failed to show that the TAC had acted imprudently in imposing the moratorium."[46]

The district court's "Order Directing Entry of Judgment" makes no mention of the remaining count (Count VII). After disposing of the other counts in the amended complaint by number, including Counts V and VI which were dismissed from the case prior to trial, the court instructed the clerk of court in paragraph four of its order ("paragraph 4") how judgment should be entered: "4. On the remaining counts [i.e., Counts II, IV, and VII], the clerk shall enter judgment in favor of Harry L. Hunt in the amount of $352,748.74 plus costs. The judgment shall be paid from the [Plan] [F]und." We read this language, and the final judgment entered by the clerk, as disposing of Count VII in favor of Hunt, [47] although the court did not grant the injunctive relief the count requested.[48]

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46 How the court could assume, "for sake of argument, that [Hunt] proved a breach of fiduciary duty" and then deny him relief on Count III is a question that court's dispositive order does not answer.

47 By treating the district court's final judgment as having terminated Count VII of Hunt's amended complaint, we have a final judgment before us that is appealable under 28 U.S.C. § 1291 because the judgment has adjudicated all claims against all parties. See, e.g., Penton v. Pompano Contr. Co., 963 F.2d 321, 321-22 (11th Cir. 1992). Hunt's amendment of his complaint, which deleted ALPA and O'Connor from the action, operated to dismiss those parties from the suit. See supra note 42. The amendment, however, did not operate to dismiss Eastern from the case. Id. Rather, Eastern was dismissed from the case, with prejudice, when Hunt and Eastern executed a stipulation of dismissal and filed it with the court. See Oswalt v. Scripto, Inc., 616 F.2d 191, 194-95 (5th Cir. 1980). In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

48 The district court, despite deciding sub silentio Count VII in Hunt's favor, granted him no relief on this count. In their briefs, the parties have ignored Count VII altogether; like the district court, they made no

Following the entry of final judgment, the TAC and the Plan appealed the district court's judgment on Counts II and IV. Hunt cross-appealed the court's judgment on Count I but not Count III. For the reasons that follow, we reverse the court's judgment on Counts II and IV, and affirm as to Count I.

III.

Paragraph 4 of the district court's "Order Directing Entry of Judgment," which gave Hunt judgment on Counts II, IV, and VII for the lump-sum benefit, presents several threshold issues that must be resolved before we can consider the merits of his claim to that benefit. As stated previously, in paragraph 4, the court directed the clerk to "enter judgment in favor of [Hunt] in the amount of $352,748.74 plus costs. The judgment shall be paid from the [Plan] [F]und."[49]

The first threshold question is whether the relief granted in paragraph 4 is legal or equitable;[50] that is, does the relief granted constitute a money judgment or an in personam order directing the TAC or the Plan to pay Hunt a sum of money from the assets of the Plan's Fund. The answer to this question is important because, as we explain below, the relief provided in an action to recover benefits under ERISA is equitable, not legal. More specifically, the

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mention of it. Because of our disposition of Hunt's explicit claim for benefits contained in Counts II and IV, Count VII falls by the wayside. That is to say, we vacate the court's judgement on Count VII and direct the court to enter judgment in favor of the TAC and the Plan on that count.

49 We note that the final judgment entered by the clerk quoted this language verbatim.

50 If the relief granted in paragraph 4 is equitable, we have jurisdiction to review the grant under 28 U.S.C. § 1292 (a) (1). See supra note 47.

relief consists of an order directing a person or entity having the necessary authority under the benefit plan to pay the participant the benefit that he seeks. Hunt sought such equitable relief in Count II of his amended complaint, asking the district court to enter "an order requiring Defendants to pay Hunt his benefits." In Count IV, Hunt sought legal relief, demanding "judgment against Defendants . . . jointly and severally for payment of his benefits." In Count VII, titled "Injunctive Relief," Hunt asked the court to "enter an order enjoining payment of benefits . . . to current beneficiaries, at least to the extent that sufficient funds are retained to pay Hunt's lump sum benefit."

Nothing in the language of paragraph 4 orders the TAC to do anything. If, however, we construe -- that is, effectively rewrite -- paragraph 4 so that it orders the TAC to pay the benefit from the Fund,[51] then we must decide whether the TAC has the authority under the Plan to effect payment; if not, the TAC cannot provide the relief sought. Despite its representations to the contrary, Eastern, the Plan administrator, obviously could effect payment if order to do so, see supra part I.C and infra part III.B, but Hunt voluntarily dismissed it from the case with prejudice. Nor can the Plan as an entity provide any relief; the Plan alone is simply a written instrument executed by Eastern and ALPA.

We turn now to these issues, taking them up in order.

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51 In his original complaint, of course, Hunt took the position that Eastern, as Plan administrator, was the party having the authority to effect payment of the benefit he is seeking; this was his reason for naming Eastern as a party defendant in his claims to recover his lump-sum benefit. Since eliminating Eastern from his amended complaint as a party defendant, Hunt has taken the position that the TAC, not Eastern, is the entity having the authority to effect payment of the benefit.

A.

Section 502(a)(1)(B) of ERISA provides that "[a] civil action may be brought by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). On its face, this language does not indicate whether a participant seeking to recover retirement benefits may obtain legal or equitable relief. Although the "causes of action authorized by section 502(a)(1)(B) [of ERISA] are not explicitly denominated as equitable," see Pane v. RCA Corp., 868 F.2d 631, 636 (3d Cir. 1989),[52] this circuit has treated actions to recover benefits under section 502(a)(1)(B) as equitable in nature. See, e.g., Shannon v. Jack Eckerd Corp., 113 F.3d 208, 209-10 (11th Cir. 1997) (denying appeal of district court's judgment ordering plan administrator to pay benefits to plan participant); Godfrey v. BellSouth Telecomm., Inc., 89 F.3d 755, 756-57 (11th Cir. 1996) (affirming district court's issuance of "an injunction ordering [Plan administrator] to comply with ERISA and pay [participant] . . .benefits"). This position is consistent with our view that participants suing under section 502(a)(1)(B) are not entitled to a jury trial. In Blake v. Unionmut, Stock Life Ins. Co. of Amer., we reasoned:

> The nature of an action under section 502(a)(1)(B) is for the enforcement of the ERISA plan. Although the plaintiffs assert that they are claiming money damages, in effect they are claiming the benefits they are allegedly entitled to

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52 In Pane, the Third Circuit aptly captured the distinction between legal and equitable relief in the context of an action brought under section 502 (a) (1) (B) of ERISA: "A legal remedy would result in a money judgment enforceable only by execution, or other conventional common law process such as ejectment of replevin. An equitable remedy would result in a judgment enforceable in personam and by contempt." 868 F.2d at 635-36.

> under the plan. Although . . . a money judgment would satisfy their demands, . . . only an order for continuing benefits would be sufficient. This is traditionally equitable relief . . .

906 F.2d 1525, 1526 (11th Cir. 1990). This view accords with the majority of circuits that have considered this issue.[53] We therefore hold that Hunt's claim for legal relief (i.e., a money judgment) under section 502(a)(1)(B) fails to state a claim. Accordingly, we dismiss Count IV of Hunt's amended complaint, leaving only his claim for equitable relief in Count II to recover his lump-sum benefit.

Given the equitable nature of Hunt's recovery-of-benefits claim under ERISA, we also find that an in personam order enjoining the payment of benefits under section 502(a)(1)(B) must be directed to a person or entity other than the plan itself. While ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1), does state that "[a]n employee benefit

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53 See Wardle v. Central States, Southeast & Southwest Areas Pension Fund, 627 F.2d 820, 829 (7th Cir. 1980) ("We conclude that Congress' silence on the jury right issue reflects an intention that suits for pension benefits by disappointed applicants are equitable."), cert. denied, 449 U.S. 1112, 101 S. Ct. 922, 66 L.Ed.2d 841 (1981); see also Sullivan v. LTV Aerospace and Defense Co., 82 F.3d 1251, 1258-59 (2d Cir. 1996); Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1007 (4th Cir. 1985); Turner v. CF&I Steel Corp., 770 F.2d 43, 47 (3d Cir. 1985), cert. denied, 474 U.S. 1058, 106 S.Ct. 800, 88 L.Ed.2d 776 (1986); In re Vorpahl, 695 F.2d 318, 321-22 (8th Cir. 1982); Calamia v. Spivey, 632 F.2d 1235, 1237 (5th Cir. Unit A 1980). Some district courts have suggested that Firestone Tire & Rubber v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), calls these holdings into doubt. See, e.g., Hulcher v. United Behavioral Sys., 919 F.Supp. 879, 885 (E.D. Va. 1995) (holding that "action to recover [ERISA] benefits under the subject plan are legal in nature" and that "[p]laintiff is constitutionally entitled to trial by jury on any claim raised under § 1132 (a) (1) (B)"); Vaughn v. Owen Steel Co., 871 F.Supp. 247, 250-51 (D.S.C. 1994) (finding that section 502 claim under ERISA is analogous to state law contract claim and must be tried before jury). None of the courts of appeals mentioned above, however, have endorsed the reasoning of these district courts.

plan may sue or be sued . . . as an entity," nothing in ERISA permits the district court to issue an injunctive order solely against the plan.[54] Rather, the case law of this circuit demonstrates that an order enjoining the payment of benefits from an ERISA plan must issue against a party capable of providing the relief requested. See, e.g., Shannon, 113 F.3d at 209-10; Godfrey, 89 F.3d at 756-57; cf. Fisher v. Metro. Life Ins. Co., 895 F.2d 1073, 1074 (5th Cir. 1990) (affirming district court's dismissal of plaintiff's second amended complaint in part for failure to name the plan administrator as an "indispensable party"). We therefore reject the notion that an injunctive order to pay benefits under section 502(a)(1)(B) of ERISA can issue solely against an ERISA plan as an entity.

B.

We next examine the district court's ruling in paragraph 4 that "the clerk shall enter judgment in favor of Harry L. Hunt [on Counts II, IV, and VII]" and that "[t]he judgment shall be paid from the [Plan] fund." Because an injunctive order cannot issue against the Plan itself, we assume that we have discretion to construe -- i.e., effectively rewrite -- paragraph 4 so that it directs the TAC to pay Hunt the lump-sum benefit from the Fund.

Our review of the record and the Plan,[55] however, makes clear that the TAC has no authority under the Plan to

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54 ERISA § 502 (d) (2) states that "[a]ny money judgment . . . against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity." 29 U.S.C. § 1132 (d) (2). This provision contemplates legal relief and does not apply to an action to recover benefits under section 502 (a) (1) (B).

55 Unless otherwise specified, the term "Plan" in part III refers to the written instrument in effect at the time Hunt's application was "approved" on April 22, 1991 (i.e., Documents 91 and 91A).

issue or deny payment of a lump-sum benefit to a participant. Rather, the TAC has limited powers under the Plan[56] and plays no role in the process of reviewing applications for retirement benefits. Unlike Eastern, the TAC's authority is primarily limited to the management and supervision of the Fund's assets. Its "overall supervisory responsibility" is restricted to the "administrative functions of the Fund," see § 2.13(b)(I) ("Fund Administration"), and its duty to the Plan is limited "to maintain[ing] surveillance over the status and administration of the Plan and the [Fund]," see § 10.2(b) ("Rights and Duties of the [TAC]").

In addition, as discussed in part I.B., supra, the TAC must exercise its limited powers in a manner consistent with its obligations to ALPA. For example, before selecting and replacing investment advisors and trustees, the TAC must notify ALPA of its planned course of action and give ALPA an opportunity to respond. See § 2.7(b) ("Trust Agreement and Trustee"). Similarly, before giving any notice or instruction to a trustee of the Fund, the TAC must serve a copy of the trust direction on ALPA and give it fifteen days to object to the TAC's proposed direction. See § 2.8 ("Directions to Trustee(s)). In addition, the TAC must "regularly and periodically suppl[y]" information to ALPA about transactional detail, cash flow reports, investment status, documentation and Fund performance," see § 2.11 ("Information and Accountability"), and furnish to ALPA and Plan participants reports about the TAC's "functions, actions, and decisions . . . as are reasonable and appropriate," see § 10.2(c).

In stark contrast, the plain language of the Plan gives Eastern broad discretion as administrator to make decisions

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56 We review the relevant provisions of the Plan here because a named fiduciary must discharge its duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA]." ERISA § 404 (a) (1) (D), 29 U.S.C. § 1104 (a) (1) (D).

for the Plan. The Supreme Court has stated that a plan administrator has a "statutory responsibility [under ERISA] . . . to run the plan in accordance with the currently operative, governing plan documents." Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 115 S.Ct. 1223, 1230, 131 L.Ed.2d 94 (1995). Section 2.2(a) of the Plan confers upon Eastern "those powers necessary to carry out the day to day operation of the Plan." Its responsibilities include the authority to "initially determine all questions arising from the administration, interpretation, and application of the Plan pursuant to all applicable law, agreements and contracts, and such determination shall be binding upon all persons, except as otherwise provided by law, and further provided that each Participant shall be granted the same treatment under similar conditions." Id. The Plan also charges Eastern with the responsibility for, inter alia, keeping records, see § 2.4 ("Records"), preparing and distributing periodic Plan summaries, see § 2.5 ("Plan Summary"), and sending to each participant an annual statement reflecting the value of his investment in the Plan, see § 2.6 ("Annual Statement").

More important, based on the record before us,[57] we find that Eastern exercises ultimate authority in determining whether a participant should receive payment of his benefit. The record reveals that Eastern plays the central role in the process of reviewing applications for benefits. The Plan makes Eastern responsible for providing the benefit-application forms to participants. See § 12.9(a)

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57 As stated in part I.C and note 12, supra, the Plan does not set forth the procedure for processing claims for retirement benefits. This account of the claims-processing procedure is taken from the affidavit and deposition of Charles Dyer of Hawthorne and the affidavit of Brian White, who served as Director of the Eastern Pension and Insurance Department. Both accounts of Eastern's claims-processing procedure are virtually identical.

("Application for Benefits").[58] A pilot seeking a lump-sum payment must complete the necessary paperwork and inform an Eastern management employee, the Chief Pilot, of his intention to retire. The Chief Pilot checks the pilot's eligibility under the Plan, and then informs the Eastern Pension and Insurance Department about the pilot's decision to retire.[59] The application is then presented to the Eastern Pension Administration Department, which must provide an authorizing signature beneath a line that states: "The above information is approved and the appropriate allocation from the Plan to provide the benefit payable is hereby authorized." If the application is approved, the Eastern Pension and Insurance Department contacts the Plan's actuary, which determines the precise amount of benefits to which the retiring participant is entitled. The actuary then gives that information to the State Street Bank & Trust, which makes the distribution to the participant. Eastern is responsible for establishing and maintaining a procedure for giving the participant written notification if the application is denied. See § 2.3 ("Notification of Denial of Benefits"). If there is a legal dispute as to the proper recipient of a benefit, Eastern may withhold payment pending final determination of the proper beneficiary. See § 12.10 ("Beneficiary Dispute").

The facts of this case support our reading that Eastern, not the TAC, has the authority to order payment of retirement benefits. First, the record makes clear that Eastern retained its authority as administrator at all times during the events giving rise to this litigation. When Hunt's application was "approved" by Eastern's Pension

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58 Section 12.9 also states that each participant "shall . . . furnish the Administrator with such documents, evidence, data, or information in support of such application as the Administrator shall consider necessary or desirable."

59 As stated in part I.D. supra, after the moratorium began, the retiring participant would contact Eastern's Pension and Insurance Department directly rather than go through the Chief Pilot.

Administration Department on April 22, 1991, Eastern was listed in the written instrument as the Plan administrator.[60] When the Plan was amended effective June 25, 1991, Eastern continued to serve as administrator for all aspects of the Plan, with the exception of the newly introduced periodic-payment option and the provision for Plan loans. See § 6.11(f) ("Periodic Payments"), Article XV ("Plan Loans").[61] Even after the Plan was amended effective June 30, 1992, with the bankruptcy court's approval of Document 91C, Eastern retained its authority as Plan administrator.

Second, the record demonstrates that Eastern, despite its representations to the contrary, made the decision to honor the moratorium and ultimately prevented the State Street Bank and Trust from issuing a lump-sum payment to Hunt. As noted in part I.D, supra, the director of Eastern's Pension and Insurance Department stated that the process for reviewing benefit claims after the shutdown "basically remained the same, except that . . . Eastern would inform Mercer [the Plan actuary] whether a participant had applied for benefits following shutdown, thus implicating the lump-sum moratorium." By this statement, Eastern effectively admits that it ratified the imposition of the moratorium and thus denied Hunt's application. In essence, Eastern's order to the actuary to halt the processing of Hunt's application foreclosed the State Street Bank and Trust from issuing him a benefit check.

Furthermore, there is nothing in the record to indicate that Eastern challenged the legality of the moratorium after its imposition. Eastern's inaction is especially glaring when one considers that Article XIII of the Plan, titled "Modification, Suspension or Discontinuance," vests Eastern

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60 At this time, the Plan consisted of Document 91 and Document 91A.

61 This version of the Plan included the amendment referred to as Document 91B.

with the exclusive authority to modify, suspend or discontinue a feature of the Plan:

> Eastern expects to continue the Plan indefinitely, but necessarily reserves the right to modify, suspend or terminate it at any time including, but without limiting the generality of the foregoing, discontinuance of the contributions of Eastern under the Plan or modification, suspension, or discontinuance in its entirety or with respect to any feature thereof. However, any modification, suspension, or discontinuance shall not adversely affect the retirement, death or termination benefits already provided at that time under the Plan for any Participant, contingent annuitant, or beneficiary as of the date of such modification, suspension, or discontinuance. In the event the Plan shall be discontinued, such action shall be taken as shall insure to the extent possible the satisfaction of all liabilities to Participants, contingent annuitants, and beneficiaries that have accrued under the Plan.

§ 13.1 ("General") (emphasis added). Although this provision enumerates only one specific application of this subsection (i.e., the discontinuation of Eastern's contributions), the phrases "including, but without limiting the generality of the foregoing" and "with respect to any feature thereof" would encompass other scenarios, such as the suspension of the lump-sum payment option. Thus, if Eastern wanted to challenge the TAC's purportedly

"unilateral" imposition of the moratorium, the Plan certainly gave Eastern the authority to do so.[62]

It is clear that Eastern, not the TAC, bears ultimate responsibility for the denial of Hunt's lump-sum benefit. Hunt, however, in an obvious attempt to avoid the effect of the bankruptcy court's approval of the Document 91C amendment, voluntarily dismissed Eastern with prejudice as a party to this action pursuant to Fed. R. Civ. P. 41(a)(1)(ii) shortly after filing his amended complaint.[63]

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62 Hunt suggests that the moratorium on lump-sum payments was impermissible because it was inconsistent with § 13.1's provision that "any modification, suspension, or discontinuance shall not adversely affect the retirement, death or termination benefits already provided at that time under the Plan for any Participant." We note, however, that the moratorium lump-sum payments had no effect on Hunt's actual interest in the Plan -- i.e., the total number of annuity units in his accrued benefit; rather, the moratorium only changed the manner in which Hunt and other similarly situated participants could receive their benefits.

Given the Plan's status as a defined contribution plan, the value of a participant's interest in the Plan fluctuates with the performance of the Fund's assets. See supra part I.B. After all, the full name of the Plan is the "Variable Benefit Retirement Plan for Pilots": a participant's interest in the Plan depends not only on the contributions made but also on how the Fund's assets perform.

63 Eastern's dismissal from the case with prejudice operated as an adjudication on the merits in favor of Eastern on all claims Hunt had brought against the company. Citibank, N.A. v. Data Lease Fin. Corp., 904 F2d 1498, 1501-02 (11th Cir. 1990) ("[A] stipulation of dismissal with prejudice . . . at any stage of a judicial proceeding, normally constitutes a final judgment on the merits which bars a later suit on the same cause of action." (citation omitted). This adjudication by dismissal would include, of course, Hunt's claims (1) that Eastern, as the administrator and as a fiduciary under the Plan, breached its obligation to Hunt and other Plan participants by declaring, or ratifying the TAC's declaration of, the moratorium, and (2) that Eastern wrongfully refused to pay Hunt the lump-sum benefit he seeks. In this appeal, the TAC and the Plan have not argued that this disposition of Hunt's claims against Eastern had a preclusive effect on Hunt's claims against them. Accordingly, we do not consider the issue.

Nevertheless, the district court ruled in paragraph 4 of its order that the TAC possessed the authority to issue payment from the Fund. In so ruling, the district court implicitly rewrote the Plan to give the TAC that power. Although we recognize that the "principal object of [ERISA] is to protect plan participants and beneficiaries," Boggs v. Boggs, 117 St.Ct. 1754 ___(1997), 65 U.S.L.W. 4418 (1997), we agree with the First Circuit's admonition that "courts have no right to torture language in an attempt to force particular results . . . To the exact contrary, straightforward language in an ERISA-regulated insurance policy should be given its natural meaning." Burnham v. Guardian Life Ins. Co. , 873 F.2d 486, 489 (1st Cir. 1989) (citation omitted). See also Hamilton v. Air Jamaica, Ltd., 945 F.2d 74, 78 (3d Cir. 1991) ("While ERISA was enacted to provide security in employee benefits, it protects only those benefits provided in the plan. . . ERISA mandates no minimum substantive content for employee welfare benefit plans, and therefore a court has no authority to draft the substantive content of such plans.") (citation and quotation marks omitted), cert. denied, 503 U.S. 938, 112 S.Ct. 1479, 117 L.Ed.2d 622 (1992); cf. Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986) (written employee benefit plans governed by ERISA may not be modified by oral agreements). We therefore reject the district court's sub silentio revision of the Plan which enabled the court to direct the TAC to pay Hunt his lump-sum benefit.

C.

Given the district court's view that the TAC denied Hunt's lump-sum benefit by issuing the moratorium, however, we will assume arguendo that the TAC could order the State Street Bank and Trust to issue Hunt payment from the Fund. For the district court's theory of liability to make sense, the TAC would necessarily have acted as de facto Plan administrator in Eastern's stead; as discussed above,

this theory is inconsistent with the Plan and clearly unsupported by the record. Yet, even if we indulge the assumption that the TAC functioned as de facto administrator, we remain convinced that the facts of this case justified the imposition of the moratorium and the concomitant denial of Hunt's lump-sum benefit.[64]

When evaluating a plan administrator's decision to deny benefits, a district court must first determine the appropriate standard of review. Firestone v. Bruch holds that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility or to construe the terms of the plan." 489 U.S. 101, 115, 109 S.Ct. 948, 956, 103 L.Ed.2d 80 (1989). We have interpreted Firestone to mandate an arbitrary and capricious standard of review, which is often used interchangeably with an abuse of discretion standard, if the administrator has discretionary authority to make eligibility determinations or to construe disputed terms of the plan. See Jett v. Blue Cross and Blue Shield of Ala., 890 F.2d 1137, 1139 (11th Cir. 1989). To trigger this standard of review, the language conferring discretion on the administrator must be "express language unambiguous in its design." Kirwan v. Marriott Corp., 10 F.3d 784, 789 (11th Cir. 1994) (internal citations omitted). If the administrator suffers from a conflict of interest in rendering its determination, the district court should apply a heightened arbitrary and capricious standard. See Firestone, 489 U.S. at 115, 109 S.Ct. at 957; see also Marecek v. BellSouth Telecomm., 49 F.3d 702, 705 (11th Cir. 1995).

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64 In its analysis, the district court assumed that the common law of trusts gave the TAC the power to impose the moratorium. We need not make this assumption for this hypothetical scenario, however, because Article XIII of the Plan clearly gives the administrator the authority to impose a moratorium.

The arbitrary and capricious standard is the appropriate standard of review in this case because the Plan contains express language conferring discretionary authority upon the administrator to construe its terms. Under section 2.2(a) ("Administration"), the administrator enjoys the authority to "initially determine all questions arising from the administration, interpretation, and application of the Plan pursuant to all applicable law, agreements and contracts, and such determination shall be binding upon all persons, except as otherwise provided by law." We have held that comparable language is sufficient to trigger review under the arbitrary and capricious standard. See Jett, 890 F.2d at 1139("[Plan administrator] has the exclusive right to interpret the provisions of th[is] Plan, so its decision is conclusive and binding."); Guy v. Southeastern Iron Workers' Welfare Fund, 877 F.2d 37, 38-39 (11th Cir. 1989) ("[Administrator has] full power to construe the provisions of [the] Trust"). Thus, we apply the arbitrary and capricious standard of review to the TAC's "decision" as de facto administrator to deny Hunt's lump-sum benefit. We stress that our principal inquiry in this hypothetical situation is not whether the TAC was justified in imposing the moratorium, but whether the TAC was justified in denying Hunt's application for a lump-sum benefit. Of course, our analysis of the latter issue necessarily implicates the former.

Under the arbitrary and capricious standard of review, the court seeks "to determine whether there was a reasonable basis for the [administrator's] decision, based upon the facts as known to the administrator at the time the decision was made." Jett, 890 F.2d at 1139. The facts presented at trial bear out that the TAC acted reasonably in its decision as de facto administrator to impose the moratorium on lump-sum payments. First, the record paints an extremely bleak picture for the Plan in January 1991. It is undisputed that the Plan was low on liquid assets as of the eighteenth of that month. Following the commencement of the Chapter 11 reorganization proceeding on March 9, 1989,

Eastern reduced and eventually stopped making contributions on behalf of its pilots. Moreover, between 1986 and 1990, the amount of lump-sum payments paid to retiring pilots dramatically increased; fewer than twenty-five pilots selected another benefit option after the lump-sum option became available in 1983. In 1986, roughly $52,000,000 was disbursed in lump-sum payments; that number grew to more than $200,000,000 in 1990.[65] Between January 1 and January 18, 1991, already $38,000,000 had been disbursed as lump-sum payments.[66]

This paucity of liquid assets was further exacerbated by the depressed performance of the Plan's substantial real estate holdings. Former Citicorp president William Spencer, a member of the TAC during the period in question, stated at trial that "[t]he real estate which comprised a sizable part of the fund was in a funk, and . . . unless some time was developed [so the real estate] could evolve, the hardships on all of the [Plan's] members would be very extreme." Another former TAC member, former President Ford, stated in his deposition that the Plan could not have made lump-sum payments to all retiring pilots without subjecting its real estate holdings to a "fire sale" at prices far below market value. Both former TAC members agreed that holding a fire sale of such potentially valuable assets would have been grossly imprudent. Hunt did not dispute the validity of this testimony.

Second, the terms of the Plan make clear that the administrator owes an equal fiduciary duty to all Plan participants, including annuitants and those who have not elected any benefit option. The administrator is required to

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65 The following amounts were distributed in lump-sum payments between 1986 and 1990: $52,091,000 (1986); $79,389,000 (1987); $107,954,000 (1988); $181,856,000 (1989); and $200,540,000 (1990).

66 At this rate, more than $60,000,000 would have been disbursed in lump-sum payments in January 1991 alone.

treat all participants equally at all times in running the Plan. See § 2.2(a) ("[T]he Administrator . . . shall have those powers necessary to carry out the day to day operation of the Plan. . . and initially determine all questions arising from the administration, interpretation, and application of the Plan . . . provided that each Participant shall be granted the same treatment under similar conditions." (emphasis added). Moreover, as named fiduciary, the TAC bears a heavy obligation to ALPA. See supra part III.B (discussion of TAC's obligations to ALPA under §§ 2.7(b), 2.8., and 2.11).

Hunt was one of approximately 2,500 pilots who were affected by Eastern's shutdown and the moratorium. Like the hundreds of other Eastern pilots who failed to submit their benefit applications by the close of business on January 18, 1991, Hunt was unable to take advantage of the original lump-sum option that was in effect prior to Eastern's shutdown.

If the Plan administrator were to grant Hunt's lump-sum benefit application, however, it would be arbitrarily favoring Hunt over all of the pilots who, like Hunt, did not submit their application before the imposition of the moratorium. As a fiduciary under ERISA, the administrator owes a responsibility to administer the plan "in accordance with the documents and instruments governing the plan." ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). The Plan plainly states that the administrator is required to discharge its duties in a manner ensuring that ""each Participant shall be granted the same treatment under similar conditions."" See § 2.2 ("Administration" (emphasis added). Given this fiduciary responsibility, the administrator, when faced with Hunt's benefit application, made the reasonable decision to treat Hunt exactly like all of the other pilots in his position -- that is, to deny his lump-sum benefit despite its "approval" by Eastern's Pension Administration Department. Therefore, even assuming arguendo that the TAC functioned as de facto administrator, we would find that its "denial" of

Hunt's lump-sum benefit was reasonable based upon the facts known by it at that time.[67] Accordingly, in this hypothetical case, the TAC's "denial" of Hunt's lump-sum benefits would pass muster under the arbitrary and capricious standard of review.[68]

IV.

Hunt cross-appeals the district court's refusal to impose a statutory penalty on the TAC for its alleged failure to comply with Hunt's requests for information.[69] Under

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67 As indicated above, we have managed to locate ample information in the record to justify under the arbitrary and capricious standard of review the imposition of the moratorium. We would agree, however, with the district court's assessment that the TAC presented its supporting evidence at trial in a wholly incoherent manner: "[B]ecause the [TAC's data was] either incomplete or not adequately explained, this court was left to wonder what the numbers and figures really meant."

68 Although Hunt is not entitled to receive the total value of his accrued benefit in one full lump-sum payment, we assume that he remains eligible to elect the modified lump-sum option available under Document 91C like all other similarly situated Eastern pilots affected by the shutdown and moratorium.

69 As stated in part II.A, supra, Hunt dispatched four letters allegedly in response to Eastern's February 4, 1991, letter to all Eastern pilots. His March 15, 1991, letter to Dyer of Hawthorne inquired about the status of his pension. His March 20, 1991, letter to O'Connor requested the most current statement of his account and the most recent financial statement for the Plan ""showing [its] assets and liabilities." His July 15, 1991, letter to Dyer requested a statement of "the TAC's position on his application," copies of all amendments to the Plan affecting his benefits, an explanation if the TAC were to deny his application, and the name, address, and the forms necessary to file a claim with the Pension Dispute Board if the TAC decided not to pay his lump-sum benefit. This letter also was sent to the then-chairman of the TAC. His August 19, 1991, letter to O'Connor requested copies of the "amendments to the [Plan]," an explanation of whether the TAC "had the right to amend the [Plan],"

section 502(c) of ERISA, an administrator who "fails or refuses to comply with a request for any information which such administrator is required by [ERISA] to furnish to a participant or beneficiary. . . within 30 days after such request may . . . be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal." 29 U.S.C. § 1132(c).[70] ERISA requires the administrator to provide participants with, inter alia, the latest updated summary plan description, the latest annual report, a statement to each participant indicating the total benefits accrued, and "other instruments under which the plan is established or operated."[71] See ERISA §§ 104(b)(4), 105(a)(1), 29 U.S.C. §§ 1024(b)(4), 1025(a)(1). The imposition of this penalty is committed to the district court's discretion. ERISA § 502(c), 29 U.S.C. § 1132(c).

The issue in this cross-appeal is whether the TAC should be considered an "administrator' for purposes of section 502(c) of ERISA. The previous discussion shows that the Plan designated Eastern as Plan administrator, whereas the TAC served as named fiduciary and as administrator of only the periodic-payment and loan options.[72] Hunt contends, however, that the TAC functioned

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and a statement disclosing the number of applications for lump-sum benefits filed since January 18, 1991.

70 Section 502(a)(1)(A) of ERISA empowers participants and beneficiaries to sue "for the relief provided for in subsection(c) of [section 502]." 29 U.S.C. 1132(a)(1)(A).

71 In the alternative, the TAC argued that Hunt did not request information that ERISA requires an administrator to provide. Like the district court, we make no ruling on this issue.

72 See supra parts I.D. and III.C. We note again that our discussion in part III.C merely assumes for the sake of argument that the TAC served as Plan administrator. Of course, neither the Plan nor the record provides a legitimate basis for making that assumption.

as de facto administrator and thus should be held liable for failing to respond to his requests for information.

Hunt bases his claim on Law v. Ernst & Young, 956 F.2d 364 (1st Cir. 1992), and Rosen v. TRW, Inc., 979 F.2d 191 (11th Cir. 1992), in which we endorsed the analysis set forth in Law.[73] In Law, an ERISA-plan participant sued his former employer for failing to provide requested information about his benefits in a timely fashion; the plan documents in that case did not designate the former employer as administrator. After reviewing the plan documents in question, the First Circuit held that if the company "acted as the plan administrator in respect to dissemination of information concerning plan benefits, it may be properly treated as such for purposes of the liability provided under [section 502(c)]." Law, 956 F.2d at 373; see also Rosen, 979 F.2d at 193-94 ("We agree with the reasoning of the First Circuit and we hold that if a company is administrating the plan, then it can be held liable for ERISA violations, regardless of the provisions of the plan document.") The Law court further reasoned that to refrain from imposing liability on such an entity simply because it is not named as plan administrator "would cut off the remedy Congress intended to create." Law, 956 F.2d at 373. Finding "a plethora of evidence" showing that the company had "controlled the provision of information," id. At 372, 373, the First Circuit affirmed the lower court's judgment for the statutory penalty. Id. At 374. In reaching this conclusion, the court emphasized two facts in particular: (1) that the company, according to the plan documents, still exercised considerable control over plan administration; and (2) that the plaintiff's requests for information were eventually answered by company employees on company stationery. Id. At 373-74.

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73 Other circuits have concluded that, for the statutory penalty to apply, the administrator must be the entity so designated in the plan documents. See Jones v. UOP, 16 F.3d 141, 144-45 (7th Cir. 1994); McKinsey v. Sentry Ins., 986 F.2d 401, 404-05 (10th Cir. 1993).

Although Hunt states in his brief that "Eastern had delegated, and TAC had assumed, the role of Plan Administrator," the record demonstrates that this statement is patently incorrect. First, as discussed in parts I.D and II.C, supra, the record makes clear that with the exception of the periodic-payment and loan options, which were added effective June 25, 1991,[74] Eastern retained its authority as administrator of the Plan at all relevant times. In fact, a July 1991 letter sent from the TAC to all plan participants regarding the periodic-payment and loan options makes this fact unambiguously clear: "The [Plan's] Trust Administrative Committee is designed as Administrator of both of these new [Plan] provisions only. As in the past, Eastern retains administrative authority over all other provisions of the [Plan]."[75] Consequently, Eastern retained its responsibility under the Plan to provide information such as plan summaries and annual statements to all participants. See §§ 2.5, 2.6.

Second, Hunt's claim fails because he misinterprets Eastern's simple instructions to all participants in its February 4, 1991, letter. Hunt argues in his brief that this letter, which was sent by Eastern and printed on Eastern stationery, indicated that the "TAC was the authority designated by the Plan Administrator for dissemination of information regarding the [Plan]." This short letter, however, stated that "[q]uestions regarding the temporary moratorium should be addressed to the [TAC]" (emphasis added); it made no representation that the TAC was now responsible for providing plan summaries, annual statements,

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74 Hunt did not participate in either the periodic payment or loan option, so this issue is not germane to his claim.

75 This letter was sent pursuant to the TAC's authority under § 10.2(c) "[t]o furnish to . . . Participants such reports with respect to the functions, actions, and decisions of the [TAC] as are reasonable and appropriate."

amendments, and other such information to participants.[76] Furthermore, with the exception of the TAC's responsibilities as administrator of the periodic-payment and loan options, the record is devoid of evidence showing that the TAC had assumed any of Eastern's duties regarding the provision of information to participants. We therefore hold that Hunt has failed to support his contention that the TAC functioned as de facto Plan administrator and that the district court properly declined to impose a penalty on the TAC pursuant to ERISA § 502(c), 29 U.S.C. § 1132(c).

V.

In light of the above, we REVERSE the judgment of the district court awarding $352,748.74 plus costs to Hunt from the coffers of the Plan's Fund (Counts II and IV).[77] We AFFIRM the decision of the district court to deny Hunt the assessment of a statutory penalty under section 502(c) of ERISA (Count I).

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76 Hunt's arguments on this claim reveal a profound misunderstanding about basic aspects of the Plan. For example, he contends that the "TAC further held themselves out to be the Plan Administrator by claiming to be negotiating for, and selecting, an administrative services provider." The Plan, however, charges the TAC, as named fiduciary, with the responsibility for selecting investment advisors and other administrative service personnel, provided that the TAC obtains ALPA's consent. See §§ 2.9, 2.13(c),(d).

77 Although the district court gave Hunt judgment on Count VII, it refused to give him the relief he sought in that count. See supra note 48 and accompanying text. Nonetheless, for completeness, we reverse the court's judgment on Count VII as well as the court's judgment on Counts II and IV.

COX, Circuit Judge, concurring in part and dissenting in part:

I dissent from that part of the court's opinion that holds that an action for recovery of benefits under ERISA § 502(a)(1)(B) cannot be maintained solely against an ERISA plan as an entity. I join the remainder of the court's opinion, and, because the holding from which I dissent is an alternative holding, I concur in the result reached by the court.

In my view, ERISA allows an action to recover benefits to be brought solely against an ERISA plan as a entity, with appropriate relief including a money judgment against the plan. The statute clearly states that "[a]n employee benefit plan may sue or be sued under this subchapter as an entity." 29 U.S.C. § 1132(d)(1). The statute then describes the mechanics of suing the plan. See id. ("Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan.") And finally, the statute provides that "[a]ny money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity . . ." 29 U.S.C. § 1132(d)(2). Although in the form of a money judgment, this relief is equitable relief. See Calamia v. Spivey, 632 F.2d 1235, 1236-37 (5th Cir. Unit A 1980). In Calamia, the court explained that "[s]ince Congress has the power to entrust enforcement of new rights to courts sitting as in equity, the first step in determining the legal or equitable nature of an action such as [a claim for benefits] is to examine the intent of Congress." Id. At 1237 (citation omitted). Finding congressional intent to be unclear, the court looked at how similar actions were treated before the merger of law and equity. See id. In so doing, the court concluded that--because the application of the arbitrary and capricious standard has traditionally been performed by judges--an

action to recover benefits is equitable in nature. See id. See also Wardle v. Central States, et al., 627 F.2d 820, 828-30 (7th Cir. 1980).

Although our cases have not squarely addressed the issue, we have allowed actions asserting claims for benefits under ERISA to proceed solely again ERISA plans. See Springer v. Wal-Mart Associates' Group Health Plan, 908 F.2d 897 (11th Cir. 1990); Guy v. Southeastern Iron Workers' Welfare Fund, 877 F.2d 37 (11th Cir. 1989). Decisions from other circuits have explicitly held that claimants may sue only their ERISA plan. See Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1324 (9th Cir. 1985) ("ERISA permits suits to recover benefits only against the Plan as an entity . . ."); and Lee v. Burkhart, 991 F.2d 1004, 1009 (2d Cir. 1993) (quoting Gelardi).

In short, the majority's holding that one seeking to recover benefits under an ERISA plan cannot proceed solely against his plan runs counter to the language of ERISA and is not supported by our prior decisions. We have allowed such actions to proceed against both the plan and the plan administrator, without explicitly addressing the issue of who is the proper defendant. See Marecek v. BellSouth Telecomm., 49 F.3d 702 (11th Cir. 1995). We also have allowed such actions to proceed against the administrator alone--again without explicitly addressing the issue. See Godfrey v. BellSouth Telecomm., 89 F.3d 755 (11th Cir. 1996); Kirwan v. Marriott, 10 F.3d 784 (11th Cir. 1994); Jett v. Blue Cross and Blue Shield of Alabama, 890 F.2d 1137 (11th Cir. 1989). But whether an action for benefits may be maintained solely against the administrator, or against both the plan and the administrator, are not issues presented by this case.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 95-2078

---

HARRY L. HUNT,

Plaintiff-Appellee, Cross-Appellant,

versus

HAWTHORNE ASSOCIATES, INC.,

Defendant,

EASTERN AIR LINES VARIABLE BENEFIT RETIREMENT PLAN FOR PILOTS; TRUST ADMINISTRATIVE COMMITTEE OF THE EASTERN AIR LINES VARIABLE BENEFIT RETIREMENT PLAN FOR PILOTS

Defendants-Appellants, Cross-Appellees.

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On Appeal from the United States District Court for the Northern District of Florida

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Before TJOFLAT and COX, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellee, cross-appellant, Harry L. Hunt, is Denied.

ENTERED FOR THE COURT:

/s/

Gerald B. Tjoflat

UNITED STATES CIRCUIT JUDGE

ORD-41

FILED: November 18, 1997

Thomas K. Kahn, Clerk

U.S. COURT OF APPEALS

ELEVENTH CIRCUIT

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 95-2078

---

HARRY L. HUNT,

Plaintiff-Appellee, Cross-Appellant,

versus

HAWTHORNE ASSOCIATES, INC.,

Defendant,

EASTERN AIR LINES VARIABLE BENEFIT RETIREMENT PLAN FOR PILOTS; TRUST ADMINISTRATIVE COMMITTEE OF THE EASTERN AIR LINES VARIABLE BENEFIT RETIREMENT PLAN FOR PILOTS

Defendants-Appellants, Cross-Appellees.

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On Appeal from the United States District Court for the Northern District of Florida

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ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11 th Cir., 19__, ____F.2d____).

Before TJOFLAT and COX, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/

Gerald B. Tjoflat

UNITED STATES CIRCUIT JUDGE

ORD-42

FILED: November 18, 1997

Thomas K. Kahn, Clerk

U.S. COURT OF APPEALS

ELEVENTH CIRCUIT

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

HARRY L. HUNT,

Plaintiff,

v. TCA 92-40064-WS

HAWTHORNE ASSOCIATES, INC.;
TRUST ADMINISTRATIVE COMMITTEE
OF THE EASTERN AIR LINES
VARIABLE BENEFIT RETIREMENT PLAN
FOR PILOTS; and EASTERN AIR LINES
VARIABLE BENEFIT RETIREMENT PLAN
FOR PILOTS,

Defendants.

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Argued September 27, 1994
Decided December 14, 1994

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Before STAFFORD, *District Judge*

## ORDER DIRECTING ENTRY OF JUDGMENT

STAFFORD, *District Judge*.

Plaintiff Harry L. Hunt, a retired Eastern Air Lines pilot, filed this lawsuit after the defendants failed to pay him the lump-sum retirement benefits due him under the Eastern Air Lines Variable Benefit Retirement Plan for Pilots (the "B-Plan"). Hunt seeks relief, and this court has jurisdiction, under the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. §§ 1001-1461.

A bench trial was held on September 27, 1994. Because Hunt settled with Hawthorne Associates, Inc., before trial, the Trust Administrative Committee of the Eastern Air Lines Variable Benefit Retirement Plan for Pilots (the "TAC") and the B-Plan were the only defendants appearing. Having now considered the evidence and arguments presented at trial, the court enters the following findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure.

### I. FINDINGS OF FACT

1. Formerly a pilot for Eastern Air Lines, Harry L. Hunt was a fully vested participant in the B-Plan prior to January 1, 1991.

2. The B-Plan became effective on September 1, 1958, pursuant to the collective bargaining agreement then in effect between Eastern Air Lines, Inc., ("Eastern") and the Air Line Pilots Association ("ALPA"). Later restated to comply with ERISA, the B-Plan is a defined contribution, variable benefit pension plan, the assets of which are controlled and invested by the TAC and various investment advisors selected by the TAC. Eastern is designated as the plan administrator, and the TAC is the named fiduciary of the plan. Doc. 89, Ex. A.

3. As amended on June 30, 1986, the B-Plan provides Eastern with the responsibility for determining whether applicants are entitled to benefits, for keeping demographic records of plan participants, for preparing periodic summary plan descriptions, and for sending participants an annual statement reflecting the amount of their investment in Eastern pension plans. Doc. 89, Ex. A at 15.

4. The B-Plan provides Eastern -- not the TAC -- with the authority to modify, suspend, or discontinue any feature of the plan, provided that any such modification, suspension, or discontinuance does not adversely affect the benefits already provided at that time to a participant. Doc. 89, Ex. A at 68.

5. As the B-Plan's fiduciary, the TAC is responsible for selecting and monitoring B-Plan trustees and investment advisors, for developing and adopting investment guidelines to be used by the trustees and investment advisors, for allocating funds to the trustees and investment advisors for investment, and for furnishing reports to participants concerning the TAC's actions and decisions. Doc. 89, Ex. A at 14-19.

6. The B-Plan requires that, before giving any notice, instruction, consent, amendment, agreement, direction or approval to any trustee of B-Plan property, the TAC must serve a copy of the trust direction upon ALPA, which then has fifteen days to serve objections thereto, if any, upon the TAC. Doc. 89, Ex. A at 16. The B-Plan also requires that, when given to a trustee, all trust directions include a certification by the TAC that the direction has been approved in accordance with the plan. Doc. 89, Ex. A at 16.

7. Under the B-Plan as amended in August 1983, a retiring participant could elect to receive his or her B-Plan benefits in a lump-sum. The B-Plan specified that the amount of a lump-sum distribution would equal the actuarial

present value of the retiree's accrued benefits as of his or her effective retirement date. Doc. 48, Ex. A at 42.

8. Following the 1986 amendment to the B-Plan, a pilot seeking normal or early retirement benefits would first advise Eastern that he intended to retire. Upon verification of the pilot's eligibility for benefits, Eastern's Pension and Insurance Department would contact the B-Plan's actuary who would determine the amount of benefits to which the retiring pilot was entitled. The information concerning benefits would then be given to a TAC-appointed trustee who, in turn, would make the appropriate distribution to the pilot. Doc. 48 at 3.

9. On January 18, 1991, Eastern completely ceased its flight operations. That afternoon, by phone call to the Director of Eastern's Pension and Insurance Department, counsel for the TAC -- then Paul O'Connor -- asked Eastern to implement a moratorium on lump-sum payments under the B-Plan. O'Connor communicated the TAC's hope that a moratorium would prevent exhaustion of the B-Plan's liquid assets should the cessation of flight operations lead to a large number of early pilot retirements. The Director responded that Eastern did not have the authority to impose the lump-sum moratorium requested by the TAC. Doc. 48 at 4.

10. On January 28, 1991, in a meeting with representatives from ALPA and Eastern, O'Connor explained that the TAC had placed a temporary moratorium on the payment of lump-sum benefits from the B-Plan. Doc. 48 at 4-5. The moratorium, he said, applied to all participants who had not filed a request for a lump-sum distribution of benefits by the close of business on January 18, 1991. Doc. 48 at 4-5.

11. On February 1, 1991, Chairman of the TAC executed a "Certificate of Action ...Taken upon Unanimous Written Consent" of the TAC members. Doc. 128, Ex. F. Through this certificate, the members of the TAC, acting without a meeting, unanimously resolved that:

> the [TAC], as named fiduciary of the B-Plan, has decided to, and hereby does, impose a temporary moratorium upon the payment of benefits to all Eastern pilots who shall file requests for benefits after the close of business on January 18, 1991...
>
> counsel to the [TAC] be, and hereby is, instructed to notify Eastern of the [TAC's] request that Eastern, as B-Plan Administrator, promptly notify all Eastern pilots who shall file requests for benefits after the close of business on January 18, 1991, that, until further notice, a temporary moratorium has been placed in effect by the TAC...
>
> counsel to the [TAC] be, and hereby is, instructed to give all other and further appropriate notice of these Resolutions to the [ALPA], and to the B-Plan Trustee.... Doc. 128, Ex. F.

12. On February 4, 1991, as the TAC had requested, Eastern sent a cover letter to all Eastern Air Lines pilots with an accompanying notice from the TAC concerning the moratorium. Doc. 48, Ex. F.

13. On February 5, 1991, before he received the February 4th communication about the moratorium, plaintiff Hunt completed and submitted, on a form provided to B-Plan participants, a Notice of Retirement Status. Pl.'s Trial Ex. 1. He indicated on the form that he was electing (1) to retire effective as of March 1, 1991, and (2) to receive a lump-sum payout of the benefits due him under the B-Plan.

14. Hunt's application for retirement benefits under the B-Plan was approved by Eastern on April 22, 1991. Doc.

48 at 6. Hunt was thereafter informed that the value of his fully vested interest in the B-Plan was $352,748.74 as of March 1, 1991. Pl.'s Trial Ex. 3. Such information was provided to Hunt by Charles Dyer of Hawthorne Associates, Inc. ("Hawthorne"), then the Administrative Services Provider and an investment manager of the B-Plan.

15. Under the terms of an agreement signed by Eastern and ALPA on June 25, 1991, the B-Plan was amended to provide that, for participants filing a request for benefits after January 18, 1991, the value of benefits distributed from the B-Plan were to be determined at the time of distribution rather than at the time of retirement. Doc. 89, Ex. A at 38.

16. Under the terms of an agreement signed by Eastern and ALPA in the summer of 1992 and approved by the United States Bankruptcy Court for the Southern District of New York in the fall of 1992, the B-Plan fund was divided into two parts: a liquid portion (cash and marketable stocks and bonds) and an illiquid portion (real estate, alternative investments and working capital). Pl.'s Trial Ex. 12. Effective June 30, 1992, B-Plan participants had a percentage interest in each of the two fund portions rather than an interest in the B-Plan as a whole.

17. Under the 1992 agreement, which was called Document 91-C, the lump-sum option in the B-Plan was amended to provide for a cash payment of the liquid portion of each eligible participant's account, with the illiquid portion to be paid over time upon sale of the fund's illiquid assets. Pl.'s Trial Ex. 12.

18. When Document 91-C became effective on June 30, 1992, the moratorium imposed by the TAC on January 18, 1991, was -- in effect -- ended.

19. Although available to him under the terms of Document 91-C, a modified lump sum benefit has not been

elected by Hunt. He also has not been paid any portion of the lump sum benefit approved by Eastern on April 22, 1991.

20. During the summer and fall of 1991, Hunt, through counsel, wrote letters to Charles Dyer and Paul O'Connor -- not to Eastern -- requesting information about, and payment of, Hunt's lump-sum benefits. Doc. 76, Exs. D, E, F, & G. Specifically, Hunt requested (1) a current statement regarding the status of his B-Plan account, (2) a recent financial statement revealing assets and liabilities of the B-Plan, (3) copies of all plan amendments affecting his benefits, (4) forms to initiate action by the Pension Dispute Board, (5) information regarding the number of lump sum benefit applications submitted after January 18, 1991, and (6) payment of his B-Plan benefits. Hunt received no written responses to his written inquiries.

## II. DISCUSSION AND CONCLUSIONS OF LAW

### A. Statutory Penalty Under Section 1132 (c):

Hunt alleges in Count I of his complaint that the TAC failed to respond to his requests for information regarding his retirement benefits. He contends that, by failing to respond, the TAC violated ERISA and thereby subjected itself to liability under Section 1132(c)(1)(B), Title 29, United States Code, which section provides that:

> Any administrator...who fails or refuses to comply with a request for any information which such administrator is required by [ERISA] to furnish to a participant or beneficiary...may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal.

29 U.S.C. § 1132(c)(1). The information that the administrator must provide in order to avoid liability under section 1132(c) is listed in section 1024(b) as follows:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

29 U.S.C. § 1024(b)(4); see also 29 U.S.C. §§ 1021(a) (concerning the administrator's duty of disclosure and reporting). Absent a request for information that ERISA requires an administrator to provide, liability under section 1132(c) does not arise. A request for payment of benefits, for example, is not a request for required information under ERISA; therefore, an administrator would not be subject to liability under section 1132(c) should he fail to respond to such a request. Pane v. RCA Corp., 868 F.2d 631, 639 (3d Cir. 1989); Kleinhans v. Lisle Sav. Profit Sharing Trust, 810 F.2d 618 (7th Cir. 1987).

ERISA defines "administrator" as "the person specifically so designated by the terms of the instrument under which the plan is operated." 29 U.S.C. § 1002(16)(A)(i). Relying on this plain language in the statute, most circuit courts have concluded that for purposes of section 1132(c) penalties, a plan administrator is none other than the person so designated in the plan documents. See, e.g., Jones v. UOP, 16 F.3d 141, 144 (7th Cir. 1994) (remarking that "[t]he statute is plain: if a plan administrator is designated in the plan instrument, that is who has the statutory duty to respond to requests for information in timely fashion"); McKinsey v. Sentry Ins., 986 F.2d 401 (10th Cir. 1993) (concluding that "if a plan specifically

designates a plan administrator, then that individual or entity is the plan administrator for purposes of ERISA") (emphasis in original). Only the First Circuit has upheld a section 1132(c) penalty imposed upon an entity other than the designated plan administrator. Law v. Ernst & Young, 956 F.2d 364 (1st Cir. 1992) (concluding that a penalty under section 1132(c) may be imposed against a company that voluntarily assumes, and is known to exercise, actual control over the administration of a plan, the designated administrator of which is an inactive internal committee of that company). The first Circuit was careful to explain, however, that its decision was a narrow exception to, and was not intended to be inconsistent with, the decisions of other courts refusing to impose section 1132(c) liability on entities other than the designated plan administrator. See also Rosen v. TRW, Inc., 979 F.2d 191 (11th Cir. 1992) (following Law and finding that, where the designated plan administrator was alleged to be inactive, an employer who was alleged to be acting as a plan administrator was a proper party in an action to compel payment of benefits); Fisher v. Metropolitan Life Ins. Co., 895 F.2d 1073 (5th Cir. 1990) suggesting, in dicta, that a de facto plan administrator may be subject to section 1132(c) penalties).

In this case, there is neither evidence nor allegation that the designated plan administrator -- Eastern Air Lines -- failed, upon request, to provide required information to plan participants and beneficiaries. There is also neither evidence nor allegation that Eastern delegated its information-providing function to the TAC or any other non-designated entity. Thus, unlike the evidence in Law, the evidence here reveals that the designated administrator was an active, functioning entity for purposes of its ERISA duties. Given such circumstances, this court will follow the rule applied by the majority of circuit courts and will decline to impose section 1132(c) penalties upon anyone other than the designated administrator. Because Hunt seeks penalties again the TAC, a committee that was not the designated

administrator of the B-Plan, Hunt's claim for relief under section 1132(c) is denied.

B. Payment of Benefits:

Under ERISA, a civil action may be brought by a participant "to recover benefits due to him under the terms of his plan" or "to enforce his rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). In this case, in Count II of his amended complaint, Hunt contends that the defendants "have failed to pay or direct payment of [his lump sum benefits] and have failed to provide any disposition of Hunt's claim." Amended Complaint at ¶ 33. In Count IV, Hunt seeks judgment against the defendants for their "failure to pay Hunt the benefits to which he is entitled." Amended Complaint at ¶ 47. In both counts, as relief, Hunt seeks payment of his lump sum benefit, application for which was approved by Eastern on April 22, 1991.

The parties here agree that, but for the temporary moratorium unilaterally imposed by the TAC on or about January 18, 1991, Hunt would have received a lump sum retirement benefit of $352,748.74. They also agree that Hunt was entitled to such an amount under the terms of the B-Plan in effect on March 1, 1991, Hunt's effective retirement date. In addition, they apparently agree that the B-Plan provided the TAC no express authority to impose the January 18, 1991, moratorium. The TAC nonetheless resists Hunt's request for payment of his lump sum benefit. The TAC contends that the moratorium, while not authorized under the terms of the B-Plan, was permitted under ERISA itself. According to the TAC, under ERISA, the moratorium was needed to maintain the financial integrity of the B-Plan and to protect the economic interests of all plan participants and beneficiaries.

In support of its position, the TAC first cites an ERISA provision, section 1104, which provides that a plan fiduciary must discharge his duties with respect to a plan

solely in the interest of the participants and their beneficiaries --

> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> . . . and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]."

29 U.S.C. § 1104(a)(1) (emphasis added).

The TAC next cites a section of the Restatement (Second) of Trusts, which provides that:

> [t]he court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purpose of the trust; and in such case, if necessary to carry out the purpose of the trust, the Court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust.

Restatement (Second) of Trusts § 167 (1959). The Restatement of Trusts is relevant because case law and the legislative history of ERISA both demonstrate that section

1104 is to be governed, interpreted and judicially determined not only in light of the special nature, purpose and intent of employee benefit plans but also in light of the common law of trusts. Donovan v. Mazzola, 716 F.2d 1226 (9th Cir. 1983) (citing cases and relevant portions of U.S. Code Cong. & Ad. News), cert. denied, 464 U.S. 1040, 104 S. Ct. 704, 79 L.Ed.2d 169 (1984); Martin v. Walton, 773 F. Supp. 1524 (S.D. Fla. 1991).

Finally, the TAC cites two ERISA cases in which plan fiduciaries deviated from past practice in order to protect the economic interest of the plan participants and their beneficiaries as a whole. See Horan v. Kaiser Steel Retirement Plan, 947 F.2d 1412 (9th Cir. 1991) (upholding the plan fiduciary's decision to discontinue its long-established practice of purchasing annuities for each retiree when -- in the face of economic difficulties -- the company closed one of its plants, causing an unusually large number of employees to become eligible for retirement, and where the fiduciary was given the discretion to terminate the practice of purchasing annuities under the plan documents); Fein v. Semet, 699 F.2d 1091 (11th Cir. 1983) (upholding the fiduciary's denial of a lump sum benefit to an early retiree, despite a past practice of paying lump sum benefits to early retirees, when the denial was based on a valid concern that immediate payment of this particular lump sum benefit -- $48,000 of the plan's approximately $340,000 in assets -- would cause a financial loss to other participants and where the payment of lump sum benefits was committed to the fiduciary's discretion under the plan documents); see also Central Trust Co., N.A. v. American Avents Corp., 771 F. Supp. 871 (S.D. Ohio 1989) (upholding, in a non-ERISA case, the trustee's decision to accept a tender offer to purchase all shares in a trust, where the trustee disregarded the pass-through voting rights of the trust shareholder/participants but where, absent the sale, the trust would be terminated and the participants would receive at most $5 per share). The TAC suggests that, like the courts in

Horan, Fine, and Central Trust, the court here should find that the fiduciary's action -- in this case, the imposition of a moratorium on lump sum benefits -- was proper because the action was necessary to maintain the financial integrity of the fund for the benefit of all plan participants and their beneficiaries.

Both the appellate and the district courts in Fine addressed an issue -- allocation of the burden of proof -- that is important to the resolution of Hunt's section 1132(a)(1)(B) claims. In affirming the decision of the district court, the Eleventh Circuit wrote: "The [district] court reasonably applied standards regarding the burden of each party by holding that after Semet [an early retiree and a plan participant] met his initial burden of offering evidence of facially inconsistent treatment, the burden shifted to the trustees to show why they acted as they did." Fine, 699 F.2d at 1095. The district court, while acknowledging that the payment of a lump sum benefit to Semet was discretionary under the plan documents, held that, once Semet demonstrated that the denial of his request for immediate payment of accrued benefits was inconsistent with payments made to all prior departing plan participants, the plan trustees had the burden of demonstrating that their actions were consistent with their fiduciary duties under ERISA. Fine v. Semet, 514 F. Supp. 34, 42 (S.D. Fla. 1981).

In this case, Hunt established that, under the plan documents, he was entitled to a lump sum retirement benefit of $352,748.74, an amount that was approved by Eastern, uncontested by the TAC, but never received by Hunt because of the TAC's unilateral decision to impose a moratorium on lump sum payments. Hunt having thus demonstrated a denial, by the TAC, of his request for payment of a vested, approved retirement benefit, the burden shifted to the TAC to justify its action as being consistent with its fiduciary duties. Fine, 699 F.2d at 1095. Assuming, arguendo, that ERISA and the common law of trusts permitted the TAC to

take action not authorized by plan documents, the TAC nevertheless needed to convince this court that its action was both prudent and necessary to protect the interests of all plan participants and their beneficiaries. This it failed to do.

To be sure, the TAC presented the deposition testimony of a former TAC member, President Gerald R. Ford, who described -- without detail -- the general concerns that caused the TAC to impose the moratorium. The TAC also submitted the deposition of Charles Dyer, owner and chief executive officer of Hawthorne Associates, former investment advisor to the TAC. Dyer, who was not involved in the decision to impose the moratorium, testified -- again without detail or supporting documentation -- that his company gave the TAC periodic information about the liquidity of the fund. Finally, the TAC called as a witness William Spencer, a long-time member of the TAC, who testified that the moratorium was imposed because the TAC expected an explosion of benefit claims at a time when the liquidity of the fund, a large percentage of which was invested in a depressed real estate market, had become a major concern. Spencer, more than the other witnesses, provided actual numbers and figures -- albeit 1994 numbers and figures -- to support the TAC's position; but, because the numbers and figures were either incomplete or not adequately explained, this court was left to wonder what the numbers and figures really meant. Significantly, although an actuary regularly kept track of participant retirement accounts and submitted periodic reports to the TAC about the amounts available and needed for payment of benefits to participants and their beneficiaries, the TAC failed to call as a witness any actuary or expert who could explain to the court why imposition of a multi-year moratorium was actuarially justified. Quite simply, in defending Hunt's section 1132(a)(1)(B) claims, the TAC relied too much on conjecture, supposition, and imagination and too little on concrete facts and careful analysis. The TAC having thus

failed to satisfy its burden on defense, the court will enter judgment in favor of Hunt on Counts II and IV.[1]

C. Breach of Fiduciary Duty:

In Count III of his amended complaint, Hunt alleges that the TAC willfully and wantonly breached its fiduciary duties under the terms of the B-Plan. As the named fiduciary under the B-Plan, the TAC is required to discharge its duties "solely in the interest of the participants and beneficiaries and ...for the exclusive purpose of...providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1)(A)(i). In the event of a fiduciary breach, ERISA provides that:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a). The Supreme Court has construed this language to mean that recovery under section 1109 inures to the benefit of the plan as a whole and not to individual participants or beneficiaries. Massachusetts Mut. Life Ins.

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[1] By its decision, the court is not saying that the moratorium was unjustified. It is merely saying that, in this case, the TAC failed to submit sufficient evidence to satisfy its burden of proof in defending against Hunt's recovery of benefits/enforcement of rights action.

Co. v Russell, 473 U.S. 134, 105 S. Ct. 3085, 87 L.Ed.2d 96 (1985). In the words of the Supreme Court: "A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." 473 U.S. at 142.

In a previous order, this court noted that Hunt's complaint contains no specific factual allegations to support his claim that the TAC breached its fiduciary duty to the B-Plan through mismanagement. Doc. 106 at 6. In conclusory fashion, Hunt simply alleges that "if the moratorium was imposed because of the B-Plan's inability to pay lump sum benefits to retiring employees electing that option, then these Defendants have breached their fiduciary duties to the B-Plan and to Hunt through mismanagement." Doc. 76, Amended Complaint at ¶ 44. He seeks damages on behalf of the B-Plan "in the amount sufficient to fully fund the retirement benefits authorized under the B-Plan." Doc. 76, Amended Complaint at ¶ 45. Importantly, at trial, Hunt submitted neither evidence of mismanagement nor -- assuming, for the sake of argument, that he proved a breach of fiduciary duty -- evidence from which this court could fashion a remedy. Hunt having thus failed to satisfy his burden of proof on Count III, judgment will be entered in favor of the defendants.

Accordingly, it is ORDERED:

1. Pursuant to the Agreement for Entry of Judgment (Doc. 133) filed September 7, 1994, the clerk shall enter judgment in favor of Harry L. Hunt, and against Hawthorne Associates, Inc. in the amount of $10,000, on Count I of the plaintiff's amended complaint. All remaining counts against Hawthorne are DISMISSED WITH PREJUDICE. No costs shall be awarded against Hawthorne.

2. Pursuant to the court's order dated December 17, 1993, the clerk shall enter judgment of dismissal as to the

TAC and the B-Plan on Counts V and VI of the plaintiff's amended complaint.

3. The clerk shall enter judgement in favor of the defendants on Count III.

4. On the remaining counts, the clerk shall enter judgment in favor of Harry L. Hunt in the amount of $352,748.74 plus costs. The judgment shall be paid from the B-Plan fund.

DONE AND ORDERED this 14th day of December, 1994.

/s/

WILLIAM STAFFORD

UNITED STATES DISTRICT JUDGE

Appendix E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

February 19, 1998

Re: Harry L. Hunt
v. Hawthorne Associates, Inc., et al.
Application No. A-619

Dear Mr. Hunt:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on February 19, 1998, extended the time to and including March 17, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By
/s/
Ruth Jones
Assistant Clerk

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

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Supreme Court, U.S.
FILED
APR 16 1998
CLERK

No. 97-1534

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1997**

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**HARRY L. HUNT,**

*Petitioner*,

**v.**

**TRUST ADMINISTRATIVE COMMITTEE OF THE EASTERN AIR LINES VARIABLE BENEFIT RETIREMENT PLAN FOR PILOTS, et al.,**

*Respondents.*

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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# BRIEF IN OPPOSITION

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## OPINIONS BELOW

The opinion of the court of appeals is reported as *Hunt v. Hawthorne Associates, Inc.*, 119 F.3d 888 (11th Cir. 1997). The opinion of the district court is unreported.

## STATEMENT OF THE CASE

On January 18, 1991, the Trust Administrative Committee of the Eastern Air Lines Variable Benefit Retirement Plan for Pilots (the "TAC") and the Eastern Air Lines Variable Benefit Retirement Plan for Pilots (the "Plan") were faced with a crisis. Eastern Air Lines, Inc. ("Eastern"), the employer, had ceased making cash contributions to the Plan as a result of its 1989 bankruptcy filing, leaving investment return as the only source of cash. Pet. App. 13a. During the same time period, pilots had been retiring at a rapidly increasing rate and virtually all of them elected to receive lump sum payments. *Id.* And a substantial portion of the Plan's assets were invested in real estate, which was depressed in value due to a nationwide real estate recession. *Id.* In combination, these factors had caused the Plan to become substantially illiquid.[1/]

The Plan is a defined contribution plan created pursuant to a collective bargaining agreement between Eastern and the Airline Pilots Association ("ALPA"), the union representing Eastern's pilots. Pet. App. 6a. In a somewhat unusual arrangement, the Plan has two fiduciaries responsible for different aspects of its administration. Eastern is designated as the "plan administrator," the entity with the powers necessary to carry out the day-to-day operations of the Plan. Pet. App.

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[1]The trial court specifically found that the Plan's illiquidity was not the result of mismanagement by the TAC. Pet. App. 80a. That finding was not disturbed on appeal.

7a. The TAC is the Plan's "named fiduciary," and is responsible for monitoring the management of the Plan's assets. Pet. App. 8a.[2] The Plan's assets are held in trust by a third fiduciary, State Street Bank and Trust Company, pursuant to a trust agreement between the Bank and the TAC. Pet. App. 7a n.7.

Eastern ceased operations on January 18, 1991, and approximately 2,500 pilots became eligible for retirement and lump sum benefits. Pet. App. 13a. The Plan could not meet such a demand for lump sum benefits without conducting a "fire sale" of its illiquid real estate assets. Pet App. 52a. Because the Plan was a defined contribution plan, with benefits based solely on the value of the assets in a participant's account, Pet. App. 6a, such a fire sale would have had been adverse to the interests of all beneficiaries. Pet. App. 52a.

Consequently, the TAC, with the duty to "maintain surveillance over the status and administration of" the Plan and its assets, imposed a moratorium on payment of lump sum retirement benefits effective as of the close of business on January 18, 1991. Pet. App. 14a. Two members of the TAC, former President Ford and former Citicorp president Spencer, testified that the illiquidity of the Plan assets, contrasted with the need for cash presented by as many as 2,500 pilots

---

[2]At the time of the events in question, the TAC was composed of two members appointed by ALPA, together with five members appointed by the existing TAC members with ALPA's approval. The members of the TAC included former President Gerald R. Ford; a former President of Citicorp, William I. Spencer; a former chairman of the Board of Metropolitan Life Insurance Company, George P. Jenkins; and a former dean of the Harvard Business School, Lawrence E. Fouraker. Pet. App. 8a n.9.

demanding lump sum benefits, made the moratorium necessary to protect the Plan's assets for the sake of all beneficiaries. Pet. App. 52a. Eastern, the Plan administrator responsible for actually paying benefits, honored the moratorium. Pet. App. 14a-15a.

Hunt filed an application for benefits after January 18, 1991, and was, accordingly, affected by the moratorium. The parties stipulated that, but for the moratorium, Eastern would have paid Hunt his requested lump sum benefits from the assets of the Plan. Pet. App. 74a.

On February 21, 1992, Hunt filed this action against several parties, including Eastern, but not the TAC or the Plan. Pet. App. 2a. A year later, Hunt filed an amended complaint that added the TAC and the Plan, but deleted Eastern as a party. Pet. App. 3a. Subsequently, Hunt and Eastern filed a stipulation dismissing with prejudice Hunt's claims against Eastern. Pet. App. 30a.

Following a bench trial, the district court entered a final judgment directing that Hunt be paid $352,748.74 from the Plan as a lump sum benefit. The court of appeals reversed.

## REASONS FOR DENYING THE WRIT

### I. THIS CASE DOES NOT REQUIRE RESOLUTION OF ANY ISSUE ON WHICH THE CIRCUITS ARE DIVIDED

Petitioner asserts that there is a conflict among the circuits on the question whether the plan administrator is a necessary party in a lawsuit to recover benefits under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. As petitioner acknowledges, however, this issue

was not raised before either the district court or the court of appeals. *See* Pet. at 11. Rather, the court of appeals raised it *sua sponte*, and decided it without the benefit of briefs from the parties. For this reason alone — because the issue was never properly framed — it does not warrant the Court's review.

Equally important, this issue involves an alternate holding, unnecessary to the result. The court of appeals stated that "an in personam order enjoining the payment of benefits under [ERISA] must be directed to a person or entity other than the plan itself." Pet. App. 41a. Citing the decisions of two other circuits, Judge Cox disagreed with this proposition. Pet. App. 59a-60a. Nevertheless, he stated, "I join the remainder of the court's opinion, and, because the holding from which I dissent is an alternative holding, I concur in the result reached by the court." Pet App. 59a. Thus, petitioner would not be entitled to the relief he seeks even if the Court agrees with him that the plan administrator is not a necessary party in an action for benefits under ERISA.[3]

---

[3]The decisions cited by petitioner and Judge Cox are, in any event, inapposite. In *Lee v. Burkhart*, 991 F.2d 1004 (2d Cir. 1993), the court held only that the plan administrator was not liable for the payment of benefits from a self-funded welfare plan that was no longer being funded by the employer. And in *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323 (9th Cir. 1985), the court held that the plan administrator was not subject to a claim for breach of fiduciary duty, because it performed no discretionary functions and was therefore not a fiduciary. Neither case involved a claim for benefits asserted against a plan, and thus, neither court had occasion to consider whether the plan administrator was a necessary party to an order to pay benefits from the plan.

The ruling on which all three members of the panel agreed — that the TAC's decision to impose a moratorium on lump sum benefits was neither arbitrary nor capricious — is unrelated to the question on which the circuit courts are allegedly in conflict. On the contrary, the court of appeals' ruling is fully consistent with well-settled principles of law. The court properly stated the rule that "'a denial of benefits challenged under [29 U.S.C. § 1132(a)(1)(B)] is to be reviewed under a de novo standard *unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility or to construe the terms of the plan.*" Pet. App. 50a (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (emphasis added). The court went on to note that "[t]he arbitrary and capricious standard is the appropriate standard of review in this case because the Plan contains express language conferring discretionary authority upon the administrator to construe its terms." Pet. App. 51a. Applying this standard, the court of appeals held that the TAC acted appropriately. *Id.* at 51a-54a. Plenary review is plainly not warranted to determine whether the court of appeals properly applied the arbitrary and capricious standard to the particular facts of this case.[4]

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[4]Contrary to petitioner's assertion, *see* Pet. at 8-12, the court of appeals did not review the district court's factual findings de novo. Rather, the court of appeals held that the district court erred as a matter of law in failing to apply a deferential standard of review to the actions of the TAC. Pet. App. 53a-54a.

## II. THIS CASE PRESENTS AN ISSUE THAT IS NOT LIKELY TO RECUR

Petitioner asserts that the decision below "cripples the enforcement provision of ERISA." Pet. at 13. However, the parties' substantive rights under ERISA are the same regardless of whether the nominal defendant is the plan administrator or the plan itself. If a pension plan participant brings an action solely against the plan, the court will rarely if ever dismiss an action on that technical ground alone, without permitting the participant to amend his complaint to name the plan administrator as a defendant. *See* Fed. R. Civ. P. 15(a) (leave to amend pleadings "shall be freely given when justice so requires").

This case, however, was complicated by petitioner's highly unusual procedural maneuvers. First, petitioner filed suit in the district court against Eastern and a number of other parties. Then, over petitioner's objection, the bankruptcy court overseeing Eastern's liquidation approved an amendment to the Plan that adversely affected petitioner's position in the district court litigation. "[I]n an obvious attempt to avoid the effect of the bankruptcy court's [ruling]," Pet. App. 48a, petitioner dismissed his action against Eastern (the Plan administrator) and filed an amended complaint naming the TAC and the Plan as defendants. The awkward procedural posture of this case, which is unlikely to be repeated in the future, makes it extremely unlikely that a decision by the Court would affect anyone other than the parties to this case itself.

## III. THE DECISION BELOW IS FULLY CONSISTENT WITH THE PURPOSES OF ERISA

Contrary to petitioner's contention, the decision below does not depart from Congress's intent in enacting ERISA. To

be sure, Congress enacted ERISA to protect the interests of pension plan participants such as petitioner. Under ERISA, however, the TAC had a fiduciary duty to *all* of the Plan's participants — not just to petitioner.

ERISA provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Although the TAC considered the alternative of a sale of real estate to solve the Plan's liquidity problem, President Ford testified that the TAC "would have been very imprudent . . . to have sold that real estate in that particular crisis. It was far wiser, much more prudent, to hold those assets until the real estate market in those areas improved." R5-125-25-26. And indeed, the real estate market has improved substantially since the moratorium was imposed in 1991. R5-125-36, 55. Under these circumstances, the TAC would have been vulnerable to an action for breach of fiduciary duty had it *not* imposed the moratorium to protect the interests of all the participants in the Plan.

Moreover, the dispute in this case concerns only the *form* of benefit that petitioner is entitled to receive from the Plan. Former Eastern pilots such as petitioner are entitled to receive their benefits under the Plan, but over a period of time, as the Plan's real estate holdings and other assets are liquidated in an orderly manner. Distribution of the Plan's assets in this manner ensures that all of the participants will receive the balance in their individual accounts, with no unnecessary diminution in value. The TAC's action is, accordingly, fully consistent with ERISA's purpose of protecting all of a pension plan's participants.

## IV. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW A CONFLICT BETWEEN TWO DECISIONS OF THE SAME COURT OF APPEALS

The Court does not ordinarily grant certiorari to review *intra*circuit conflicts. *See Davis v. United States*, 417 U.S. 333, 340 (1974). Thus, petitioner misses the mark with his assertion that plenary review is necessary to resolve a conflict between the decision below and the decision of the Eleventh Circuit Court of Appeals in *Fine v. Semet*, 699 F.2d 1091 (11th Cir. 1983). In any event, the decision below does not conflict with *Fine*. In that case, the court held that once a participant has "met his initial burden of offering evidence of facially inconsistent treatment" of similarly situated participants, the burden shifts to the plan trustees to justify their actions. *Id.* at 1095. Unlike the plaintiff in *Fine*, petitioner received the same treatment as similarly situated participants. The moratorium on lump sum benefits applied to all participants, including Hunt, who submitted applications after the close of business on January 18, 1991. Indeed, as the Eleventh Circuit noted, "[i]f the Plan administrator were to grant Hunt's lump-sum benefit application, . . . it would be arbitrarily favoring Hunt over all of the other pilots who, like Hunt, did not submit their application before the imposition of the moratorium." Pet. App. 53a. Thus, the Eleventh Circuit's decision in *Fine* is inapposite.

Moreover, contrary to Hunt's contentions, nothing in *Fine* suggests that the burden of proof ever shifts in an action for benefits under ERISA. Instead, *Fine* stands for the unremarkable proposition that, once a plaintiff states a prima facie case, the burden of going forward shifts to the defendant. The district court in this case failed to recognize that fact. The district court further failed to recognize that the TAC's only obligation, even assuming that Hunt had established a prima facie case, was to present evidence demonstrating that its

decision was neither arbitrary nor capricious. For this reason, the court of appeals correctly concluded that the district court erred as a matter of law. *See* n.4, *supra*.

## V. THE COURT OF APPEALS DID NOT BASE ITS DECISION ON THE COMMON LAW OF TRUSTS

In Question 3, petitioner requests that the Court review this case to decide whether pension plan fiduciaries should have "an unrestricted cloak of protection under the 'common law of trusts.'" Pet. at i. The decision of the court of appeals, however, was not based on the common law of trusts. On the contrary, the court of appeals specifically stated:

> [T]he district court assumed that the common law of trusts gave the TAC the power to impose the moratorium. We need not make this assumption . . . , however, because . . . the Plan [itself provides] the authority to impose a moratorium.

Pet. App. 50a n.64. Thus, Question 3 is not properly before the Court.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: April 1998